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Military Aircraft and International Law: Chicago Opus 3

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**MILITARY AIRCRAFT AND INTERNATIONAL LAW:
CHICAGO OPUS 3¹**

MICHEL BOURBONNIERE
LOUIS HAECK

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I. CIVIL AND MILITARY INTERFACE

ON FEBRUARY 5, 1997, a National Guard F-16 was operating in a warning area airspace established over the Atlantic Ocean when it intercepted Nations Air flight 70, a Boeing 727, which was crossing the warning area following an IFR flight plan. The Nations Air flight 70 was a chartered flight originating from San Juan, Puerto Rico en route to J.F.K. International Airport in New York. Seventy-seven passengers and seven crew members were on board.² The close proximity of these two planes activated the B-727's Traffic Collision and Alert System (TCAS), which obliged the B-727's flight crew to execute maneuvers in response to the TCAS Resolution Advisories.³ Both the National Transportation Safety Board (NTSB) and the Department of Defense (DOD) cooperated in investigating this incident. One conclusion from this joint investigation was that some confusion existed over the class identification of off shore airspace, the status of warning areas, and the applicability of operating rules and standards to such situations.⁴ The NTSB recommended that the Federal Aviation Administration (FAA) develop, in cooperation with the DOD, a formal document that would clearly define the roles and responsibilities of each

² See 97 NTSB REP. 113 (1997), available at http://www.nts.gov/NTSB/brief.asp?ev_id=20010108X00058&Reg=1.

³ See *Warning Areas and Offshore Airspace*, 99-3 AIR TRAFFIC BULL. 7(1999), available at <http://www.faa.gov/ATpubs/ATB/99-3.htm>. The 727 executed a descent followed by two separate instructions to climb. See NTSB REP., *supra* note 2.

⁴ 97 NTSB REP. 112, available at <http://www.nts.gov>.

agency concerning Special Use Airspace (SUA).⁵ On January 1998, representatives of the FAA, DOD, and National Air Traffic Controllers Association held a meeting to review SUA guidance. Concerns identified pertained to communication, coordination procedures, and responsibilities for the separation of aircrafts in such situations. As a result, the FAA, in conjunction with the DOD, which included representatives of the Office of the Assistant Secretary of Defense for Command Control, Communications and Intelligence, the U.S. Navy, the U.S. Air Force, and the U.S. Army, issued Air Traffic Bulletin 99-3 titled "Warning Areas and Offshore Airspace." Air Traffic Bulletin 99-3 is now a mandatory briefing and training item for controllers.⁶ This bulletin was also provided to the DOD for distribution and briefing. The incident was closed following the Safety Recommendation A-97-113.

Although no damages resulted from this incident, the fact remains that civil and state airplanes share a common airspace and that their interaction is an ineluctable reality of our epoch. Air traffic safety can only be achieved through a close cooperation of all who use the air medium.

On the global level, a minimum civil-military regulatory interface within the international legal matrix is a necessary prerequisite to creating safe skies. Present and past international legal instruments regulating air transportation and navigation have almost exclusively dealt with civil or commercial aviation, practically excluding military aircraft from their scope of applicability.

Although the legal status of state aircraft, including military aircraft has not been specifically dealt with in international treaties, it has not been completely ignored either. This note will examine international norms of conventional and customary origin regulating the flight of military aircraft as a subset of state aircraft. While our analysis will concentrate on the legal status during peacetime, certain legal aspects of air operations during times of armed conflict will also be discussed.

International public air law instruments have a conceptual tradition based upon a theory of functionalism. Air law perceives the flight of an aircraft through a conceptual paradigm, which creates a regulatory distinction between the flight of a state aircraft and the flight of a civil aircraft. Our contemporary legal

⁵ See NTSB REP., *supra* note 4.

⁶ The FAA also revised certain paragraphs in Order 7110.65, "Air Traffic Control," effective February 24, 2000.

instruments are loyal to this bifilar tradition maintaining the use of dichotomously structuring norms based on two classes of aircraft. These regulatory poles are either civil aviation on one hand and state aircraft on the other. The activity, purpose, or task being accomplished during the flight of an aircraft will determine the applicable norms. Thus, within the *corpus* of international public air law, the rights and duties, which affect the flight of an aircraft, are contingent upon its function. As function remains the fulcrum of a delicate legal balance, the proper determination of the function gains, to say the least, in importance. How does one determine the function of the flight of an aircraft? What attributes of a flight may be used to qualify the activity, purpose, or task of the flight of an aircraft? In establishing this function the registration of the aircraft is certainly very useful but does not establish an irrevocable determination of the function of a flight. Thus, the flight of an aircraft can be either of a public or private activity, irrespective of its registration.⁷ Furthermore, ownership by itself is also not recognized in international treaties as an attribute irrevocably determining the civil or public nature of an aircraft's flight. Again, ownership, like the registration of an aircraft, can certainly be an element of proof in determining the function of a flight, but they are, by themselves, insufficient to ineluctably establish the functional nature of the flight of an aircraft.

State aircraft are mainly composed of military aircraft. However, a caveat must now be mentioned. In dealing with matters of military activities of states, customary norms can be difficult to ascertain. International customary norms have a bipartite construction. Customs are composed of a material act and of a psychological element called *opinio iuris et necessitatis*.⁸ Practice and *opinio iuris et necessitatis* are often difficult to discern in military matters as the practice and motivations of states are quite often obscured and shrouded within a penumbral veil of national security and hence, secrecy. Nonetheless, we argue that national military manuals, military orders, and unclassified peacetime rules of engagement are all indicative of the *opinio iuris et necessitatis* of states on these matters.

⁷ See NGUYEN QUOC DINH, *DROIT INTERNATIONAL PUBLIC* 1200 (6th ed. 1999).

⁸ See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 4-8 (3d ed. 1979); see also *Asylum (Colom./Peru)*, 1950 I.C.J. 266 (Nov. 20).

The International Court of Justice (ICJ) had initially established a strict approach in proving *opinio iuris et necessitates*,⁹ establishing that *opinio iuris et necessitatis* cannot be inferred from practice alone. However, in a more recent decision,¹⁰ the ICJ did show more flexibility by stating that *opinio iuris et necessitatis* can be determined by using, among other things, UN General Assembly (UNGA) resolutions or statements made by state representatives. This case also establishes a methodological difference from the *Lotus* and *North Sea*¹¹ cases in that *opinio iuris et necessitatis* can be established prior to appraising practice. This element is important in evaluating military activities as practice presupposes orders. Consequently, in light of these ICJ decisions, we proffer that it is reasonable to argue that, in establishing customary norms of international air law or in determining proper treaty interpretation of the Chicago Convention, resolutions of the assembly of the International Civil Aviation Organization (ICAO) have, to say the least, probative value. Granted, *opinio iuris necessitatis* and *opinio iuris generalis* are not the same concepts. UNGA resolutions and ICAO Assembly Resolutions are an expression of *opinio iuris generalis*. Other factors must also be considered in determining the effect of *opinio iuris generalis* in proving *opinio iuris et necessitatis*. These elements are, for example, the concordance of state practice with the *opinio iuris generalis*, unanimity of the vote, the fundamental nature of the resolution, elementary considerations of humanity as in aircraft interception, and persistent objectors.¹²

II. TREATY OF PARIS

The issue of state aircraft within international legal instruments can be traced to the 1910 International Air Navigation Conference. Article 46 of the Draft Convention provided that military aircraft, which are legitimately within or above foreign territory, should enjoy the privilege of extraterritoriality. The

⁹ See *Certain Norwegian Loans (Fr. v. Nor.)* 1957 I.C.J. 9 (July 6); see also SIR HERSCH LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 380 (1958).

¹⁰ See *Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.)* 1986 I.C.J. 392 (Nov. 26).

¹¹ *North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.)* 1969 I.C.J. 3 (Feb. 20); *Certain Norwegian Loans (Fr. v. Nor.)* 1957 I.C.J. 9 (July 6).

¹² See Tea L. Stein, *The Approach of a Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT'L L. J. 457 (1985); Jonathan J. Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 BRIT. Y.B. INT'L L. 1 (1985).

first codification of public international air law originated in Paris with the *Convention for the Regulation of Aerial Navigation* of October 13, 1919.¹³ The Paris Convention recognized a distinction in public international law between "private aircraft" and "State aircraft" within the following articles, namely:

Article XXX — The following shall be deemed to be State aircraft:

(a) Military Aircraft;

(b) Aircraft exclusively employed in a State service, such as posts, customs, police.

Every other aircraft shall be deemed to be a private aircraft.

All State aircraft other than military, customs and police aircraft shall be treated as private aircraft and as such shall be subject to all the provisions of the present Convention.

Article XXXI — Every aircraft commanded by a person in military service detailed for the purpose shall be deemed to be a military aircraft.¹⁴

Within the Paris Convention, each state granted, during peacetime, the *freedom of innocent passage* through its sovereign airspace to the aircraft of other contracting states. The exercise of this freedom was not contingent upon nationality.¹⁵ It is im-

¹³ See *Convention for the Regulation of Aerial Navigation* of 1919, Oct. 13, 1919, 11 L.N.T.S. 173 (hereinafter Paris Convention).

¹⁴ *Id.* at arts. 30-31. Identical provisions were contained in the Ibero-American Convention on Air Navigation signed in Madrid on November 1, 1926 (Chapter VI) and in the Pan-American Convention on Commercial Navigation signed in Havana on February 20, 1928. See 47 U.S.T. 1901. Each convention was superseded under Article 80 of the Convention on International Civil Aviation signed December 7, 1944. See Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295. The effect of repudiation of Article 80 is limited to the norms contained within these treaties which, at the time, had not been elevated to customary international law. Norms contained within these conventions, which had been universally accepted as customary norms, have an independent existence to these treaties and survive the effect of Article 80. We argue that the norms that applied sovereign immunity and extraterritoriality to State aircraft are norms which, in fact, had reached the level of customary law and survived the effects of Article 80. Although the content of the customary norm and the treaty norm can be identical, the customary and treaty norms, nonetheless, retain a separate existence. For the evolution of this concept, see *North Sea Continental Shelf* (F.R.G. v. Den.; F.R.G. v. Neth.) 1969 I.C.J. 3 (Feb. 20); *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.) 1986 I.C.J. 14 (June 27). Carlos Tünnermann Bernheim, *United States Armed Intervention in Nicaragua and Article 2(4) of the United Nations Charter*, 11 YALE J. INT'L L. 104 (1985); Herbert W. Briggs, *Appraisals of the ICJ's Decision: Nicaragua v. United States (Merits)*, 81 AM. J. INT'L L. 77, 81 (1987).

¹⁵ See Paris Convention, *supra* note 13, at art. 2.

portant to note that a specific disposition pertaining to military aircraft was included within Article 32 of the Paris Convention, which reads “. . . no military aircraft of a contracting State shall fly over the territory of another contracting State nor land thereon without special authorization.”¹⁶

Although the Paris Convention did not specifically mention the concept of “extraterritoriality,” it is nonetheless very important to note that the Parisian treaty expanded on this norm, and thus, implicitly granted the norm further international recognition. In fact, the principle itself of extraterritoriality of military aircraft was clarified and implemented within Article 32. Article 32 of the Paris Convention edicted that military aircraft, when authorized to fly over or land in the territory of a foreign country, now formally benefit from “the privileges, which are customarily accorded to foreign ships of war.”¹⁷ The Paris Convention thus acknowledged, by reference, that military aircraft that performed sovereign functions benefited from sovereign immunity.

We believe that the Paris Convention crystallized a norm of international law to the effect that military aircraft are instrumentalities of nations performing noncommercial sovereign functions. This norm then evolved through widespread acceptance to become a norm of customary nature. The evolution and present status of this norm remains unchallenged and is unequivocally accepted in the work of eminent legal publicists.¹⁸ The result of Article 32 of the Paris Convention is that military aircrafts are exempt from the application by other states of legal enforcement measures applicable to civil aircrafts.¹⁹ Furthermore, the crew of military aircraft benefit from immunity from the jurisdiction of the territorial sovereign only in so far as to acts performed during official duties.²⁰ It is also important to

¹⁶ *Id.* at art. 32.

¹⁷ *Id.*

¹⁸ As to the pertinence of doctrinal works, Article 38 of the *Statute of the International Court of Justice* establishes, within paragraph (d), their applicability “subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.” 1945 I.C.J. Acts & Docs. at art. 38(d).

¹⁹ Thus, military aircraft cannot be compelled to pay charges or taxes by attachment or execution of the aircraft. See L. OPPENHEIM, *INTERNATIONAL LAW* 851 (H. Lauterpacht, ed., 8th ed. 1962); Bin Cheng, *THE LAW OF INTERNATIONAL AIR TRANSPORT* 75 (1962); Lt. Colonel Chester D. Taylor, Jr., *International Flight of Military Aircraft in Peacetime*, 28 *FED. BAR J.* 36, 43 (1968); BROWNLIE, *supra* note 8, at 353; J.L. BRIERLY, *THE LAW OF NATIONS* 269 (Sir Humphrey Waldock ed., 6th ed. 1963).

²⁰ See Taylor, *supra* note 19, at 49.

note that foreign officials may not board a state or military aircraft without the consent of the commander.²¹ Should a dispute arise regarding customs, immigration, or quarantine, the host nation is limited to requesting that the state aircraft leave the national territory.²²

The Chicago Convention,²³ as we shall see later in this note, was very eloquent in its omissions; as it neither explicitly nor implicitly negated the customary norms affecting the legal status of military aircraft as initially codified within the Paris Convention.²⁴ We believe that the Chicago Convention codified other practices pertaining to State aircraft navigation in international airspace, such as the rule of "due regard." Nonetheless, unlike the Paris Convention, the Chicago Convention applies only to civil aviation and civil aircraft, as evidenced by Article 3. The effect of the Chicago Convention on military aircraft is minimal. Consequently, the status of military aircraft was not redefined with the Chicago Convention and remains, as stated in the Paris Convention, as a norm of customary international law.

Another issue, that has traditionally burdened international normative structures regulating aircraft, is the ease in which a civil aircraft can be converted to military use and vice-versa.²⁵

²¹ See Office of Fleet Judge Advocate, *Commander's Handbook on the Law of Naval Operations*, para. 2.2.2 (July 1987) [hereinafter *Commander's Handbook*] available at <http://www.cpf.navy.mil/pages/legal/NWP%201-14/NWPCH2.htm>.

²² See *id.*

²³ Convention on International Civil Aviation, Dec. 7, 1944, art. 3(d), 61 Stat. 1180, 15 U.N.T.S. 295 [hereinafter *Chicago Convention*].

²⁴ According to Professor Cooper, the chairman of the committee who drafted and reported Article 3 of the Chicago Convention: "It is felt that the rule stated in the Paris Convention that aircraft engaged in military services should, in the absence of stipulation to the contrary, be given the privileges of foreign warships when in a national port is sound and may be considered as still part of international air law even though not restated in the Chicago Convention." JOHN COBB COOPER, *A Study on the Legal Status of Aircraft*, in *EXPLORATIONS IN AEROSPACE LAW* 242-243 (Ivan A. Vlasic, ed., 1968).

²⁵ An interesting historical fact is mentioned by the ICAO Legal Bureau: In 1920, the Supreme War Council of the Paris Peace Conference asked one of these committees, the Aeronautical Advisory Commission to the Peace Conference, which had given its opinion in 1919, to draw up rules to distinguish between civil aviation and the military and naval aviation forbidden by the Peace Treaties. The Commission, referring to its 1919 report, replied that the task was impossible. The Supreme Council insisted that the rules be drawn up; after several months of debates, the Commission submitted what is known as "The Nine Rules" of 1922, for differentiating between military and civil aircraft. The distinction was based on technical criteria such as engine size, speed, "useful load," etc. It soon became clear that many civil aircraft fulfilled these criteria and the Rules were abandoned. ICAO Doc. LC/29-wp/2-1, attachment I, at 7.

For the planners of military operations, proper classification of an aircraft is of prime importance since only military aircraft may exercise belligerent rights.²⁶ This dual use problem manifests itself again today in space technology, where expertise initially developed for military purposes is now utilized in civil commercial applications. These are different epochs using different technology, but similar problems exist in regulating their use.²⁷ Nations initially attempted to address this issue within a proposed treaty regulating military air operations. The proposed 1923 Hague Rules of Aerial Warfare outlined two conditions pertaining to the legitimacy of the conversion of an aircraft from military to civil and vice-versa. First, the conversion of an aircraft was to be done within the jurisdiction of the belligerent state, which had jurisdiction over the aircraft. Second, such conversion could not be done in international airspace.²⁸ These two conditions certainly appear reasonable and, we argue, should still apply.

III. CHICAGO CONVENTION AND MILITARY AIRCRAFT

Contemporary international public air law presently has its "Magna Carta," which is the *Convention on International Civil Aviation*.²⁹ The Chicago Convention has received quasi-global recognition through the accession and ratification of 185 States. The Chicago Convention is not only a source of normative aviation law, but also is the basic constitutional instrument of international public administrative law as the "grundnorm" for the International Civil Aviation Organization (ICAO), a specialized agency of the United Nations.³⁰

The Chicago Convention does not contain a definition of the word "aircraft." Nonetheless, a definition exists within the Chicago system, namely within the Annexes to the Chicago Convention. For example in Annexes 6, 7, and 10, the definition reads as follows: "Aircraft: Any machine that can derive support in the

²⁶ See Draft Rules of Aerial Warfare, art. 13, 1923 proposed Hague Rules (Feb. 1923) (hereinafter Hague Draft Rules).

²⁷ Dual use can also have an impact of the insurance of airplanes. This, however, is an issue of private international law and is beyond the scope of this article.

²⁸ See Hague Draft Rules, *supra* note 26, at art. 9.

²⁹ Chicago Convention, *supra* note 23.

³⁰ See U.N. CHARTER arts. 57 and 63.

atmosphere from the reactions of the air other than the reactions of the air against the earth's surface."³¹

The words "other than the reactions of the air against the earth's surface" were added in 1967 to exclude hovercraft from being legally considered as an aircraft.

The apparent transparency of Article 3 of the Chicago Convention is deceiving. A *prima facie* reading of this article can lead one to conclude that it simply edicts the scope of applicability of the Convention, which is limited to civil aircrafts. This conclusion is somewhat facile. Granted, Article 3 does limit the scope of applicability of the treaty to civil aircrafts, and the remaining articles of the Treaty must be interpreted in this light. Nonetheless, a more rigorous analysis of Article 3 reveals its richness and subtleties. Article 3 is of prime importance to international air transport, both civil and military. It reads as follows:

Article 3

- (a) This Convention shall be applicable only to civil aircraft, and shall not be applicable to state aircraft.
- (b) Aircraft used in military, customs and police services shall be deemed to be state aircraft.
- (c) No state aircraft of a contracting State shall fly over the territory of another State or land thereon without authorization by a special agreement or otherwise, and in accordance with the terms thereof.
- (d) The contracting States undertake, when issuing regulations for their state aircraft, that they will have due regard for the safety of navigation of civil aircraft.³²

Five fundamental principles can be deduced from Article 3.³³ First, application of the Chicago Convention excludes military, custom, and police aircraft, which are deemed to be state aircraft. Second, the law-making powers of the ICAO Council to adopt Standards and Recommended Practices (SARPs)³⁴ and the overall mandate of the Organization apply exclusively to civil/commercial aircraft as defined within the Chicago system. Third, military, police and custom aircraft are state aircraft, excluded from the Chicago system and thus, are not permitted to

³¹ Chicago Convention, *supra* note 23, at Annexes 6, 7, and 10.

³² *Id.* at art. 3.

³³ Michael Milde argues that four principles are to be derived from this article. See Michael Milde, *Status of Military Aircraft in International Law*, INT'L CONF. PROC., Singapore Ministry of Defense 21-31 (1999).

³⁴ See Chicago Convention, *supra* note 23, at arts. 37, 38, 54(1) and 90.

fly over or land within the territory of a foreign State without prior express authorization of the State concerned.³⁵ Fourth, in principle, state aircraft (military custom or police) are restricted to flying within the territory of their own State,³⁶ over the high seas,³⁷ and the areas of undetermined sovereignty.³⁸ And finally, States which are a Party to the Convention have an obligation to regulate their state aircraft by promulgating within their national regulatory structure a duty of "due regard" upon operators of state aircraft, and thus, upon military aircraft, for the safety of the navigation of civil aircraft.³⁹ Parenthetically speaking, a principle cannot exist without its exceptions. Conversely, exceptions confirm the principle. This reality of norms

³⁵ This principle is subject to a few exceptions, which are analyzed in this paper, such as right of transit passage, archipelagic sea-lanes passage, entry in cases of distress, and *force majeure*. Overflight exceptions for unmanned observation aircraft were also created in the Open Skies Treaty (agreed by the North Atlantic Council Meeting in Ministerial Session at NATO Headquarters in Brussels on December 14th and 15th of 1989), but an analysis of this is beyond the scope of this article. In the Agreement Between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics on the Prevention of Incidents On and Over the High Seas (signed in Moscow on May 25, 1972), the term "aircraft" is defined as "all military manned heavier-than-air and lighter-than-air craft, excluding space craft. Art. I, § 2. This Treaty also imposes certain restriction and rules of caution and prudence on the flight of military aircraft over the high seas, such as simulated attacks by the simulated use of weapons, the performance of various aerobatics over ships, or dropping various objects near them in a hazardous manner. See Art. IV. Further, navigational lights must be used. Art. V.

³⁶ A definition of which can be found in Article 2 of the Chicago Convention, which codifies international customary law as "'territory' comprises the land mass and the territorial waters." Chicago Convention, *supra* note 23, at art. 2.

³⁷ United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, art. 87, U.N. Doc. A/CONF. 62/122, *reprinted in* 21 I.L.M. 1261 (1982).

³⁸ Other treaty norms affect military flights over Antarctica. The Antarctic Treaty of 1959 edicts certain norms applicable to military flights over the frozen continent. Antarctic Treaty, Dec. 1, 1959, 402 U.N.T.S. 71. "Antarctica shall be used for peaceful purposes only" and "any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military maneuvers, as well as, the testing of any type of weapons [shall be prohibited]." *Id.* at art. I.1. Furthermore, all aircraft, at points of discharging or embarking cargo or personnel in Antarctica, are subject to inspection by designated observers. *Id.* at art. VII.3. Due to these restrictions, classified activities are not conducted by the U.S. in Antarctica. All classified materials are removed from U.S. aircraft before going to Antarctica. See Commander's Handbook, *supra* note 21, at para. 2.4.5.2.1.

³⁹ The Chicago Convention ". . . does not apply to military aircraft or MAC-charter aircraft designated as 'state aircraft' other than to require that they operate with due regard for the safety of navigation of civil aircraft." Chicago Convention, *supra* note 23, at para. 2.5.2.1.

is also true of international public air law. Throughout this note, exceptions to the above-cited principles of Article 3 will be exposed and analyzed.⁴⁰

This note will now analyze two principles of Article 3. These are the concept and function of military aircraft and the obligation of "due regard."

A. ARTICLE 3(B)

Article 3 of the Chicago Convention refers to the concept "state aircraft."⁴¹ Unfortunately, Article 3 does not establish a definition of either the concept of state aircraft or civil aircraft. Article 3(b) of the Convention edicts that "aircraft used in military, customs and police services shall be deemed to be state aircraft."⁴² This is not a definition, but only a presumption since the word "deemed" is used. In interpreting Article 3(b), both the nature of the enumeration and the nature of the presumption must be correctly ascertained.

Using a broad interpretation of Article 3(b), the enumeration would not be limitative but would serve as an example of what could be considered to be a state aircraft. One would then have to determine a common attribute of these examples in order to

⁴⁰ For example, a controversy exists in the interpretation of the U.N. Convention on the Law of the Sea pertaining to the legitimacy of aerial military maneuvers over the exclusive economic zones, which could be an exception to the freedom of overflight edicted within Article 3 of the Chicago Convention.

⁴¹ In Canada, the Air Regulations pursuant to the Aeronautics Act define the concept of "State Aircraft" as follows: "state aircraft means a civil aircraft owned by and exclusively used in the service of Her Majesty in right of Canada or in right of any province." Aeronautics Act Air Regulations § 101(1), *available at* <http://www.tc.gc.ca/actsregs/aeronaut/old-airregs/aa2.htm>. In turn, the concept "civil aircraft" is defined within these regulations as follows: "civil aircraft means any aircraft other than a military aircraft." *Id.* The result leads to an interpretative quagmire that must be corrected. For example, according to the Canadian definition, an aircraft used in custom or police services is both a civil aircraft and a state aircraft, while the same aircraft is classified within the Chicago system as being exclusively a state aircraft. Furthermore, according to the Canadian definition, a military aircraft is not a state aircraft! The Chicago classification system clearly establishes military aircraft as state aircraft. Canadian definitions should be amended to respect the Chicago classification system. Under Australian domestic legislation (the *Air Navigation Act 1920* and the *Civil Aviation Act 1988*), the term 'state aircraft' is defined to mean "aircraft of any part of the Defense force (including any aircraft that is commanded by a member of that force in the course of duties as such a member), other than any aircraft that, by virtue of registration under the regulations, is an Australian aircraft; and aircraft used in the military, customs or police service of a foreign country."

⁴² See Chicago Convention, *supra* note 23, at art. 3(b).

justify its application to other fields. It could then be logical to conclude that these examples refer not only to acts *Iure imperii*⁴³ of states but also include acts *Iure gestionis* of States. Thus, many other types of aircraft may be involved in activities of the State, for example, medical services, mapping or geological survey services, disaster relief, VIP Government transport and mail services, or even privately owned aircraft transporting military personnel. The consequence of this approach is an expansion of the exception reducing the scope of applicability of the Chicago regulatory system.

Using a restrictive interpretation of Article 3(b), the enumeration becomes limitative or exhaustive.⁴⁴ In other words, the only Chicago-type "state" aircraft excluded from the applicability of the convention are those used in "military, customs, and police services."⁴⁵ The result of a restrictive interpretation is to reduce the exception and expand the scope of applicability of the Chicago regulatory system.

This interpretative dilemma of Article 3(b) results from the fact that the article in question does not explicitly determine the nature of this enumeration. Although both interpretations are logical from an exegetical perspective, we, however, proffer that the restrictive approach is a more reasonable and correct method of interpretation. Our position is based on the following three arguments.

First, the enumeration must be construed within the context of the treaty. Context can be determined in reference to the preambular clause.⁴⁶ The preamble expresses concern for development of international civil aviation to avoid friction and to promote cooperation and safety. The different criteria establish a setting or a contextual reference, coloring the subsequent norms. These norms can, in turn, be understood in their ability to affect the activity regulated. The limit to a contextual approach is, however, determined by the reasonableness of the conclusion reached.⁴⁷ Within its context, a restrictive interpre-

⁴³ For an interesting analysis of the *Iure imperii* and *Iure gestionis* acts of states, see BROWNLIE, *supra* note 8, at 330-32.

⁴⁴ See NICOLAS MATEESCO MATTE, *TRAITÉ DE DROIT AERIEN-AERONAUTIQUE* (2d ed. 1964); see also Cheng, *supra* note 19 at 112. Bin Cheng, *State Ships and State Aircraft*, in *CURRENT LEGAL PROBLEMS* 225 (George W. Keeton and Georg Schwarzenberger eds. 1958).

⁴⁵ See Chicago Convention, *supra* note 23, at art. 3(b).

⁴⁶ See *Rights of Nationals of the United States of America in Morocco* (Fr. v. U.S.), 1952 I.C.J. 176 (Aug. 27).

⁴⁷ See *Polish Postal Service in Danzig*, 1925 P.C.I.J. (ser. B) No. 11, at 39.

tation of the exception appears as the most cogent interpretation yielding a reasonable application of the norms with an ordinary meaning of the terms used. Although the norms can be expanded or limited through interpretation, treaties must not be revised through interpretation.⁴⁸ We believe that to construe the exception in an expansive manner would be altering the treaty itself from both grammatical and contextual perspectives.

Second, as the ICAO Legal Committee pointed out in its Report of the Secretariat on the issue when proffering an argumentation similar to ours, that in commenting Article 3(b), the Chairman of the drafting committee⁴⁹ wrote in a study published in 1949:

“. . .[The]. . .Convention is purposely less definite than some of its predecessors. The language used was understood to be vague but was considered a more practical solution than any other of the several attempts, which had been made in the past to define such classes as, for example, military aircraft. The determining factor . . . is whether a particular aircraft is, at a particular time, actually used in one of the three special types of services. If so, it is a “state aircraft.” Otherwise, it is a “civil aircraft.”⁵⁰

A polemic surrounds the use of Professor Cooper's writings on this specific issue. The representative of Canada at ICAO expressed doubts on the “persuasive value in the recollections of the Chairman of the drafting committee for Article 3,” arguing that in later studies his opinion might have “substantially evolved.” We, however, remain unconvinced by the Canadian position.⁵¹ This polemic brings up an interesting debate over the use of supplementary means of interpretation. In the *Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain*,⁵² the ICJ viewed supplementary means of interpretation as an optional tool and not as a necessary tool for interpretative confirmation. As a supplementary tool, it has less probative value than either a textual analysis or reference to the logical construct of the treaty. Within this case, the ICJ was asked to use supplementary means of interpretation to decipher a phrase. In the words of the ICJ:

⁴⁸ See Peace Treaties, 1950 I.C.J. 229.

⁴⁹ ICAO Doc. LC/29-wp/2-1, attachment I, at 13.

⁵⁰ See *id.*

⁵¹ *Id.* at. 22.

⁵² *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr.)*, 1995 I.C.J. 6 (Feb. 15).

The Court does not consider it necessary to resort to supplementary means of interpretation in order to determine the meaning of the Doha Minutes . . . however, as in other cases⁵³, it considers that it can have recourse to such supplementary means in order to seek a possible confirmation of its interpretation of the text.⁵⁴

The methodology of interpretation used by the ICJ was first to analyze the meaning and scope of the disputed phrase. This analysis was done through a semantic deconstruction using the "most natural sense"⁵⁵ and "ordinary meaning"⁵⁶ of the words. On a second level, the ICJ verified its interpretation by looking at the "logical implications of the expression"⁵⁷ interpreted. The Court then rejected possible interpretations that would "encounter serious difficulties,"⁵⁸ or would "deprive the phrase of its effect and could well, moreover lead to an unreasonable result."⁵⁹ Once the ICJ was satisfied with the result of this methodology, supplementary methods could be used, but these remained purely optional. Consequently, the probative value of supplementary means is lessened once the primary methodology yields a cogent conclusion. In this light, the polemic surrounding the use of Professor Cooper's writings to negate a strong textual argument is reduced in effect.

Finally, a restrictive interpretation of the exception, the effect of which expands the scope of applicability of the convention, is consistent not only with the *telos* of the treaty, but also with both the object and purpose of the Convention.⁶⁰ A teleological analysis is particularly relevant because the Chicago Convention is

⁵³ See, e.g., *Territorial Dispute (Libya/Chad)* 1994 I.C.J. 6, 27, para. 55 (Feb. 3).

⁵⁴ *Qatar v. Bahr.*, 1995 I.C.J. at para. 40.

⁵⁵ *Id.* at para. 35.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at para 55.

⁶⁰ See Vienna Convention on the Law of Treaties, May 23, 1969, R21.4(c) 8 I.L.M. 679 (entered into force Jan. 27, 1980). See also the *Golder Case*, 57 I.L.R. 200 (1975); *Territorial Dispute (Libya/Chad)*, 1994 I.C.J. 6 (Feb. 3). The I.C.J. confirmed that Article 31 represents customary international law of treaty interpretation. Thus, if a State is a member of ICAO, but is not a party to the Vienna Convention on the Law of Treaties, it would, nonetheless, find this interpretation binding. The word "context" of Article 31 also includes the preamble. See *The Golder Case*, 57 I.L.R. at 200; *Beagle Channel Arbitration (Chile v. Arg.)* 17 I.L.M. 634 (1978).

not an end in itself, but rather a means to an end.⁶¹ The Chicago Convention is fundamentally purposive, establishing a goal-directed international administrative structure. The end result being the safety of aviation as a whole and civil aviation in particular. Within a teleological perspective, the important interpretative questions are first, does this goal-directed activity require us to employ special concepts or define patterns found within the Chicago system to help us interpret the system cohesively? And second, should we look at the inherent nature of the Chicago system in terms that exhibit a functional activity? Finally, in describing the function of the Chicago system, should we refer to special concepts or patterns of analysis? We answer these three questions in the affirmative.

The goals of the Chicago system are not only stated in the preamble, but also form part of the objectives of ICAO as stated in Article 44 of the Chicago Convention. Thus, a restrictive interpretation of the above-cited disposition, expanding the applicability of the Chicago Convention, ensures for greater safety in air transportation. Furthermore, and most importantly, in the specific case of international organizations, the favored interpretation of the constituent document must be that which allows the organization to effectively achieve its objectives.⁶²

The nature of the presumption must also be determined. In other words, does Article 3(b) create an irrefutable *Iuris et de Iure* presumption or is it a refutable *Iuris Tantum* presumption? Airplanes have the inherent capacity for dual use. Civil airplanes can certainly be used for military missions and vice versa. One can *prima facie* conclude that this fact necessarily leads to the conclusion that the presumption must be a refutable *Iuris Tantum* presumption. This argument, despite its appeal, may be facile and, we believe, wrong for two reasons.

First, it is important to note that the drafters of the Convention used the word "shall," which implies that what follows is mandatory, implying a command, an obligation, or an instruction. At the very least, the word "shall" refers to a strong asser-

⁶¹ This is a dynamic method of treaty interpretation, specifically of its use by the ICJ. See *Rights of Nationals of the United States in Morocco (Fr. v. U.S.)*, 1952 I.C.J. 176, 197-198 (Aug. 27).

⁶² See *Certain Expenses of the United Nations*, 1962 I.C.J. 151 (July 20). Doctrinal analysis supports our position. See MATTE, *supra* note 44, at 132; Cheng, *supra* note 19, at 112 (where Professor Cheng writes that the Chicago Convention "embraces all matters relating to aviation not exclusively connected with 'aircraft used in military, customs and police services.'").

tion or intention. Conversely, the drafters of the Chicago Convention did not use the words "may be deemed," which would then necessarily lead to a refutable *Iuris Tantum* presumption. It is also interesting to note the semantic difference within Article XXX of the Treaty of Paris, which used the idiom "such as" before enumerating the "posts, customs, and police" services.

Second, the word "deemed" can be constructed to mean "considered," or within the context of this Article, "considered for the purpose of the Chicago Convention." This last point is very important and respects the interpretative subtleties required to grasp the full effect of the Chicago Convention.

For the irrefutable *Iuris et de Iure* theory to be accepted, another interpretative obstacle needs to be crossed. How can this presumption be reconciled with the dual use of aircraft argument initially presented in the *Iuris Tantum* theory? Indeed, one simply cannot negate the fact that civil airplanes can be used for military missions and vice versa. It is, however, important to note that the presumption applies to the nature of the flight and not to the aircraft itself.

The answer to this apparent paradox becomes clearer. Airplanes that are used in the execution of functions of "military customs and police services" are "Chicago-type" State aircraft. Thus, other government aircraft, which execute other *iuri imperii*, function as diplomatic transport or mail, remain state aircraft as "*qua*" state aircraft, but not as "Chicago-type" state aircraft and fall within the scope of applicability of the Chicago Convention.⁶³ However, according to state practice, aircraft that transport government officials will often benefit from a diplo-

⁶³ According to the ICAO Legal Bureau, this is the predominant view. Comparing the Chicago system with the Parisian system, the legal bureau opined that the International Commission on Air Navigation (ICAN) created by the Paris Convention had the power to amend the Annexes to that Convention, which, when so amended, would bind all contracting States; there was no opportunity to file a difference, and ICAN in effect had legislative powers. The same is not true of the Chicago system and States would be less hesitant to subject their other "state" aircraft to the Chicago regime. Furthermore, even under the Paris Convention, *all state aircraft* other than military, custom and police aircraft were treated as private aircraft and subjected to *all* the provisions of the Paris Convention. Although the Chicago Convention does not explicitly say that all other aircraft shall be treated as civil aircraft and become subject to all the provisions of the convention, there is nevertheless nothing to indicate that the drafters of the Chicago Convention had any intention to depart from the substance of this provision; it is felt that any such intention would have been spelt out unambiguously. ICAO Doc. LC/29-wp/2-1, attachment 1, at 13 (Mar. 3, 1994).

matic agreement establishing the non-applicability of the Chicago Convention to its flight.

The result of this interpretation is that the qualification of the nature of the state aircraft within the Chicago system is irrelevant to the determination of other issues, such as sovereign immunity⁶⁴ and other rights and privileges attached to state aircraft "qua" state aircraft. In the reverse situation, a state aircraft, as defined within the Chicago lexicon, is, however, necessarily a state aircraft "qua" state aircraft. Also, state aircraft that are not "Chicago-type" state aircraft are subject to the Chicago regulatory structure and are subject to the norms established within this treaty.

Taken in this light, an aircraft that performs a military, customs, or police service is irrefutably excluded from the Chicago regulatory structure, while its possible mutation to civil functions is respected.

In the context of this note, the definition of "military" aircraft is important.⁶⁵ However, the Chicago Convention does not give any definition of the term "military services."

The Vienna Convention on the Law of Treaties edicts in Articles 31 and 4 that "a special meaning shall be given to a term if it is established that the parties so intended." However, we have not been able to discern any special intention of the parties with respect to this terminology. We believe that the word "military" must be interpreted by its ordinary meaning, referring to the armed forces of a state executing acts *iuri imperii*.

What characteristics distinguish an aircraft as being "military?" The answer may only be found in a contextual analysis of the flight in question.⁶⁶

⁶⁴ It is interesting to note that the U.N. Convention on the Law of the Sea also edicts rules of sovereign immunity of state aircraft. See United Nations Convention on the Law of the Sea, *supra* note 37, at arts. 29-32, 95-96, 236.

⁶⁵ "The earliest efforts to characterize aircraft as military were based upon the character of the commander of the craft. If he was a uniformed member of the military services and had on board a certificate of the military character, the aircraft would be considered military. In the wake of World War I, some efforts were made to distinguish between civil and military aircraft on the basis of design. Later commentators pointed out the impossibility in distinguishing aircraft on the basis of design, and therefore use was the principal basis upon which aircraft were distinguished." Air Force Pamphlets, *International Law - The Conduct of Armed Conflict and Air Operations*, AFP 110-31, para. 2-4.c (Nov. 19, 1976) (hereinafter AFP 110-31); see also Colonel Frank Fedele, *Overflight by Military Aircraft in Time of Peace*, 9 AF JAG L. REV. 8, 23 (1967).

⁶⁶ A military aircraft is defined as follows: "an aircraft operated by commissioned units of the armed forces of a State having the military marks of that State,

The United States Navy defines "military aircraft" in one of its manuals as: "all aircraft operated by commissioned units of the armed forces of a nation bearing the military markings of that nation, commanded by a member of the armed forces, and manned by a crew subject to regular armed forces discipline."⁶⁷

According to USAF manuals, the Chicago system definition of "aircraft" includes both heavier and lighter than air objects, but excludes objects that are more properly perceived as being projectiles, such as rockets.⁶⁸ The presence of a crew is not important; thus allowing pilotless aircraft to fall within the Chicago definition.

We proffer that the following elements could reasonably be considered either individually or in combination in determining the military nature of the flight of an aircraft. The following characteristics however, are neither exhaustive nor determinative.

Registration marks: The nationality and registration of an aircraft may designate the aircraft as military, but that fact by itself is not conclusive proof that the aircraft is used as military in a given situation. Ownership (state or private): The fact that the aircraft is owned by a state or a defense ministry is relevant. Type of operation: The nature of the flight, flight plan, communications procedures, secrecy classification, and cargo carried, such as military equipment, including weapons are relevant. Article 35 of the Chicago Convention, however, edicts that the car-

commanded by a member of the armed forces and manned by a crew subject to regular armed forces discipline." See INTERNATIONAL INSTITUTE OF HUMANITARIAN LAW, SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA, para 13(j) (Louis Doswald-Beck ed. 1995) [hereinafter *San Remo Manual*]. This manual defines civil aircraft as "an aircraft other than a military, auxiliary, or State aircraft such as a custom or police aircraft that is engaged in commercial or private service." See *id.* at para. 13(l). The Treaty on Conventional Armed Forces in Europe, 30 INT'L LEGAL MATERIALS 1 (1991), defines the term "combat aircraft" as being a "fixed-wing or variable-geometry wing aircraft armed and equipped to engage targets by employing guided missiles, unguided rockets, bombs, guns, cannons, or other weapons of destruction, as well as, any model or version of such aircraft which performs other military functions, such as reconnaissance or electronic warfare." Art. 1(K).

⁶⁷ Commander's Handbook, *supra* note 21, at para. 2.2.1. Commissioned units of U.S. military aircraft are called squadrons and are established pursuant to the authority of the chief of service concerned. All aircraft, like warships, assume the nationality of the nation in which they are registered and are marked with symbols or designations of their nationality. The markings of military aircraft should differ from those of other state aircraft and from those of civil aircraft. See AFP 110-31, *supra* note 65, at para. 2-4(b), 2-4, 2-5, n. 14.

⁶⁸ See AFP 110-31, *supra* note 65, at para. 2-4.

riage of "munitions or implements of war" is not in itself conclusive of a state aircraft. Flight subject to military discipline and military law or civilian or military crew: Whether the operator of the aircraft is a defense ministry, military, custom, or police agency is relevant. Area of operation: This refers to whether the aircraft is flying in a theatre of military operation in an international armed conflict. Is the mission one of self defense, military training, a NATO or NORAD related flight, an execution of U.N. Charter Article 51 (self defense or collective self defense, or even a customary right of self defense) or on a U.N. mission for either peacekeeping (Chapter VI) or peace enforcement (Chapter VII), or a humanitarian mission such as the evacuation of civilians from a conflict area? Missions that result from military treaties are the execution of international obligations of states.

The key to interpreting Article 3(b) of the Chicago Convention may be found in the expressions "*used*" and "*services*." The word "*used*" is a verb. Taken in a military context, this word can mean, "deployed," usually to accomplish a mission or exercise. The word "*services*" is the plural of the word "service," which can mean the use for a particular purpose. This is clearly a functional approach to the issue. Thus, it is conceivable that a given aircraft may be classified alternatively as either civil or state. If a military aircraft is to be used to conduct a "civil flight," then the "military" aircraft, which would be subject to the rights created in the Chicago Convention, should respect the ICAO navigation and security standards. Thus, states should not allow military airplanes that do not respect ICAO standards to make civil flights. This, we argue, is not only a question of state responsibility, but also an implicit obligation resulting from a coherent interpretation respecting the integrity of the Chicago Convention.

A converse example, namely of a civil aircraft operating a "military" flight would be the following: states sometimes use their national air carrier in case of supplementary needs for military air transport capacity in times of crisis. For example, an Air Canada plane with Air Canada pilots and crew could be carrying military personnel and equipment for military purposes. Within such a scenario, two important issues arise. First, the qualification of the flight as either "civil" or "military," and second, the determination of the legal status of the crew wearing the civilian uniform of the airline while their commercial aircraft is chartered by the department of National Defense for military

use abroad. Within this scenario, the chartered plane carries only civilian markings, but it would be transporting military personnel in uniform, along with their weapons, between two military bases in different allied countries. Canada's policy in such situations is to issue special identification cards to the civilian crew in order to offer the protection of the Geneva Conventions in case of capture during hostilities. For example, in Bosnia, such a flight would have a military call sign. Without these precautions, the opposing belligerent forces could treat the civilian personnel as spies if captured.⁶⁹

An aircraft that is registered as a civil aircraft but that is subsequently leased by a national defense force or police or customs services and used in the execution of mandates particular to these services qualifies as a state aircraft and can be so designated by its national authorities.⁷⁰ The qualification of such a flight, however, remains within the discretionary latitude of national policy. If the flight retains its civil qualification, then ICAO rules must be respected. ICAO recommends that when an operator accepts the carriage of weapons, these weapons must be removed from passengers and stored in a manner in which they are not accessible to any person during flight time.⁷¹ ICAO also recommends that should an aircraft carry bombs, then "specialized means of attenuating and directing, the blast should be provided for use at the least-risk bomb location."⁷²

Considering that countries with small military budgets sometimes do need extra air transport capacity from commercial carriers for operations abroad, we believe that the legal

⁶⁹ See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 13, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; see also Geneva Convention for Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Oct. 21, 1950, art. 13, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, Oct. 21, 1950, art 4(4), 6 U.S.T. 3516, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]. The present Convention shall apply to the wounded and sick belonging to the following categories:

. . . (4) Persons who accompany the armed forces without actually being members thereof, such as civil members of military aircraft crews . . . provided that they have received authorization from the armed forces which they accompany.

⁷⁰ As a policy decision, the United States normally does not designate military contract chartered aircraft as state aircraft. See Commander's Handbook, *supra* note 21, at para. 2.2.3.

⁷¹ See Chicago Convention, *supra* note 23, at Annex 6, § 13.5.2.

⁷² *Id.* § 13.5.1.

consequences of such action should be the subject of a special study by the legal committee of ICAO. For example, Canada used Ukrainian carriers to deploy forces to Kosovo.

The only document that dealt exclusively with air warfare was the 1923 Hague Rules of Aerial Warfare.⁷³ This document also contained an article that also established a presumption, and not a definition, of a public aircraft:

Article 2

The following shall be deemed to be public aircraft:

Military aircraft;

Non-military aircraft exclusively employed in the public service.

All other aircraft shall be deemed to be private aircraft.

Public, non-military aircraft employed for customs or police purposes were to carry papers evidencing this use and bear external marks indicating both its nationality and non-military character.⁷⁴ Public, non-military aircrafts, other than those employed for customs and police were, for the purpose of aerial warfare, to be treated on the same footing as private aircraft.⁷⁵ Thus, the proposed Hague rules had a commonality with the Chicago classification system.

An interesting dimension of the problem in establishing a legal definition of "state aircraft" can be found in maritime law. The technique of importing maritime law concepts into air law is not new, however, for the Paris Convention had established a parallel in reference to warships in dealing with the status of military aircraft. The legal definition of a "warship"⁷⁶ is seen in the U.N. Convention on the Law of the Sea (1982),⁷⁷ Article 29 that reads:

For the purpose of this Convention, "warship" means a ship belonging to the armed forces of a state bearing the external marks distinguishing such ship of nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list of its

⁷³ See RICHARD GUELFF & ADAM ROBERTS, DOCUMENTS ON THE LAWS OF WAR 139 (3d ed. 2000).

⁷⁴ Hague Draft Rules, *supra* note 26, at art 4.

⁷⁵ *Id.* at art. 5.

⁷⁶ Michael Milde argues for a parallel between the definition of a warship and a possible definition of a military aircraft. See Milde, *supra* note 33.

⁷⁷ U.N. Convention on the Law of the Sea, *supra* note 37.

equivalent, and manned by a crew which is under regular armed forces discipline."⁷⁸

Under this definition, a warship does not have to be armed, and in relation, neither should a military aircraft. An aircraft carrier is certainly a "warship" as defined within the Law of the Sea Treaty. There is agreement in doctrinal analysis that an aircraft carrier, as a warship, benefits from extraterritoriality.⁷⁹ Aircraft are a necessary and indispensable part of aircraft carriers and are specifically designed to function on these ships. Being a necessary accessory to the principle, they must logically benefit from the same rights, *accessorium sequitur principale*. It would also be unreasonable to grant certain rights to certain airplanes depending upon the origin of their flight—that is, either land or sea. Our interpretation yields a coherent normative application to airplanes irrespective of the origin of their sorties.

Within its report of the Secretariat, the legal bureau of ICAO describes two incidents of aircraft interception where the qualification of the flight became an important issue.⁸⁰ The first and most important incident occurred on October 10, 1985, during the Achille Lauro incident.⁸¹ Egypt Air Flight MS 2843 was intercepted by U.S. Navy jets while in international air space, roughly eighty miles south of Crete. The airplane was en route from Cairo to Tunis and was forced to land in Sicily. The terrorists involved in the hijacking of the luxury cruise ship *Achille Lauro* were on board the airplane. According to the Legal Bureau report, the pilot considered his flight to be of a civil nature. The United States was, however, of a different opinion. The United States Government, in a letter to IFALPA dated 13 November 1985, stated

⁷⁸ According to the U.S. Department of State report to the Senate, this definition expands upon earlier definitions, no longer requiring that such a ship belong to the "naval" forces of a nation, under the command of an officer whose name appears in the "Navy list" and manned by a crew who are under regular "naval" discipline. Article 29 instead refers to "armed forces" to accommodate the integration of different branches of the armed forces in various countries, the operation of seagoing craft by some armies and air forces, and the existence of a coast guard as a separate unit of the armed forces of some nations, such as the United States. See Press Statement, U.S. Department of State Law of the Sea, 1994 Law of the Sea (Oct. 6, 1994) [hereinafter LOS Pres Statement], available at http://dosfan.lib.uic.edu/ERC/law/press_statements/9410.html.

⁷⁹ See BROWNLIE, *supra* note 8, at 366; BRIERLY, *supra* note 19, at 267-69; Oppenheim, *supra* note 19, at 461, 851-59; Cheng, *supra* note 19, at 11.

⁸⁰ See ICAO Doc. LC/29-wp/2-1.

⁸¹ See George M. Borkowski, *Use of Force: Interception of Aircraft – Interception of Egyptian Airliner by the United States, Oct. 10, 1985; Interception of Libyan Airplane by Israel, Feb. 3, 1986*, 27 HARV. INT'L L.J. 761 (1986).

[I]t is our view that the aircraft was operating as a state aircraft at the time of the interception. The relevant factors – including exclusive State purpose and function of the mission, the presence of armed military personnel on board, and the secrecy under which the mission was attempted – compel this conclusion.⁸²

It is also interesting to note that during the Egypt Air interception, the airplane was originally bound for Tunis. Tunisia had refused it permission to land, and the Greek authorities also subsequently denied the airplane landing rights in Athens.⁸³ These refusals for landing rights presuppose a reclassification of the flight as a state aircraft. The United States, therefore, was not the only country to accept the reclassification of the Egypt Air flight as a state aircraft.

The second incident cited in the report occurred on February 4, 1986 and is somewhat more controversial than the first. A Libyan Arab Airline departed from Tripoli on a non-scheduled flight to Damascus. While in international airspace, the airplane was intercepted by the Israeli air force. The Israelis were searching for Palestinian leaders,⁸⁴ but only found “seven Syrian politicians and two low-ranking Lebanese militia officials on board.” Doubts were expressed as to the nature of the flight. However, this interception was based on faulty intelligence.⁸⁵ The ICAO council adopted a resolution on February 28, 1986, stating that it considered that Israel had “committed an act against international civil aviation in violation of the principles of the Chicago Convention”⁸⁶ and condemned Israel for the interception. The commonality of these two examples lies in the reclassification of a civil flight. The first example involving the Egypt Air aircraft was an important and courageous act in the fight against international terrorism. The Egypt Air interception, like the Lockerbie Case shows,⁸⁷ that terrorists will not be allowed to hide

⁸² ICAO Doc. LC/29-wp/2-1, attachment 1, at 12.

⁸³ See Borkowski, *supra* note 81, at 762.

⁸⁴ See *id.* at 761.

⁸⁵ In reference to the Egypt Air interception, the U.S. state department emphasized that states should intercept civilian aircraft only on the basis of the strongest evidence that terrorists are on board. See Borkowski, *supra* note 81, at 762-63.

⁸⁶ ICAO Doc. LC/29-wp/2-1, attachment 1, at 12.

⁸⁷ This was the downing of Pan American Flight 103 over Lockerbie, Scotland, on December 21, 1988. This case was concerned with state-sponsored terrorism, the role of the U.N. Security Council, and the Montreal Convention of September 23, 1971. The Security Council expressed that it was deeply disturbed by acts

behind dispositions of international air law. The interchangeability of classification of a flight within the Chicago system permits States to have a scope of freedom of action. Thus, in the fight against international terrorism, the Chicago system remains vibrant and credible. The Israeli interception, however, remains as a *caveat* for States—as a dubious example of reclassification and its potential for erroneous action.

Another dubious example of aircraft interception and the possible capture of terrorists occurred on August 10, 1973, when the Israeli airforce diverted and seized a Lebanese civil aircraft that had been chartered by Iraqi Airways. According to the Chief Delegate of Lebanon at ICAO at the time, the interception occurred in the following manner.

At 21:00 hours, a Caravelle aircraft, belonging to the Lebanese carrier, Middle East Airlines, chartered by Iraqi Airways, for a flight from Beirut to Baghdad, requested clearance for take-off. The Air Traffic Controller warned the pilot of the existing danger and take-off was delayed. Ten minutes later, he received clearance for take-off and headed northwest. Two minutes after take-off, two Mirage fighter planes headed for the runway and overflew it. Four minutes after take-off of the Caravelle, the pi-

of international terrorism endangering innocent lives and having a deleterious effect on international relations and jeopardizing the security of states. See S.C. Res. 731, U.N. SCOR, 47th Sess., 3033d mtg. at 1, U.N. Doc. S/RES/731 (1992). The Security Council stated it was acting under Chapter VII and decided to create an air embargo in which all states would “deny permission to an aircraft to take off from, land in, or overfly their territory if it is destined to land in or has taken off from the territory of Libya, unless the particular flight has been approved on grounds of significant humanitarian need by the Security Council Committee established by paragraph nine below.” See also S.C. Res. 748, U.N. SCOR, 47th Sess., 3063d mtg. at 1, U.N. Doc. S/RES/748 (1992). This case was referred to the I.C.J. See Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. U.S.), 1998 I.C.J. 9 (Feb. 27). This case generated a flurry of interesting legal articles. For an analysis of this case from a Libyan perspective, see SAFIA AOUDE, *The Lockerbie Legality: What Went Wrong in International Criminal Law?*, available at <http://www.mathaba.net/info/locker-leg.htm>; see also W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT’L L. 83 (1993). David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT’L L. 552 (1993); Vera Gowlland-Debbas, *The Relationship Between the International Court of Justice and the Security Council in the Light of the Lockerbie Case*, 88 AM. J. INT’L L. 643 (1994); Jose E. Alvarez, *Judging the Security Council*, 90 AM. J. INT’L L. 1 (1996); Bernd Martenczuk, *The Security Council, the International Court of Justice and Judicial Review: What Lessons from Lockerbie?*, 10 E.J.I.L. 517 (1999); Thomas M. Franck, *The “Powers of Appreciation”: Who is the Ultimate Guardian of UN Legality?*, 86 AM. J. INT’L L. 519 (1992); Lee S. Kreindler, *Litigation Status in Lockerbie Case*, 219 N.Y. L.J. 82.

lot signaled the control tower that two Israeli Mirage planes, ordering him to change course if he wished to save the lives of his passengers, flanked his aircraft. Forty-five miles from Beirut International Airport, the Caravelle turned southwards, still escorted by the Mirage planes, entered Israeli airspace, and was forced to land.⁸⁸

Attempting to justify the interception, at the ICAO, the Chief Delegate of Israel argued that Israel believed that a dangerous criminal named George Habash of the Popular Front for the Liberation of Palestine was aboard the intercepted aircraft. The individual in question had supposedly played an important role in several hijackings and murders of passengers flying international routes.⁸⁹ According to the Chief Delegate of Israel, his country's actions were motivated partly by the desire to protect international civil aviation from terrorist actions.⁹⁰ The Israeli government qualified the interception as an exceptional measure aimed at saving human lives from terrorists, who were endangering international civil aviation.⁹¹ The Delegate of the United States expressed the view that the "resolutions unanimously adopted by the Security Council and the Council of ICAO were appropriate to the action of the Israeli Air Force."

On August 15, the United Nations Security Council expressed grave concern over this matter, qualifying the act as "a serious interference with international civil aviation and a violation of the Charter of the United Nations."⁹² In condemning the government of Israel for this interception, the Security Council stated that such acts are not only violations of conventional air law, but also of a cease-fire resolution adopted by the UNSC in 1967 and of "principles of international law and morality."⁹³ The UNSC called upon ICAO to take due account of its resolution when considering measures to protect international civil aviation against such actions.⁹⁴ The ICAO assembly responded by strongly condemning Israel for this forcible diversion of a

⁸⁸ *Report and Minutes of the Executive Committee, Minutes of the Fifth Plenary Meeting* 91, ICAO Doc. 9088 A20-EX (Aug. 30, 1973). This description of the events was not contested during the ICAO meetings. We thus accept it as true.

⁸⁹ On this issue, see Joanne F. Horvitz, *Arab Terrorism and International Aviation: Deterrence v. The Political Act*, 24 *CHITTY'S L. J.* 145 (1976).

⁹⁰ See *Report and Minutes of the Executive Committee*, *supra* note 88, at 99.

⁹¹ See *id.* at 100.

⁹² S.C. Res. 337, U.N. SCOR 174th mtg. at 1, U.N. Doc. S/RES/337 (1973).

⁹³ *Id.* at para. 2.

⁹⁴ See *id.* at para. 3.

civil aircraft in violation of the Chicago Convention.⁹⁵ Israel was also strongly condemned for violating sovereign Lebanese airspace. These examples indicate that a reclassification of a flight for possible interception in international airspace can be a legitimate act when done in the context of a state's fight against terrorism. However, this cannot be used to justify violation of sovereign airspace. Furthermore, the operation must be carefully carried out so as to not endanger civil aviation.

The use of "morality" to help determine the extent to which an action is right or wrong in a Security Council resolution is somewhat surprising but nonetheless very interesting. Could the word "morality" be interpreted as meaning "ethics," or a behavior that is adhered to in a customary fashion? Probably, however, other than to say in which chapter of the U.N. Charter it is operating under, the Security Council rarely announces within its resolutions the specific legal basis of its actions. Morality, as such, is not referred to as a source of international law within the statute of the International Court of Justice. However, within the laws regulating the use of force during armed conflict,⁹⁶ we find a text known as the Martens Clause.⁹⁷ This clause refers to requirements of "public conscience" or "public opinion" that can probably encompass issues of morality.⁹⁸ Could it be that Security Council Resolution 337 articulates an application of the Martens Clause in the use of force against civil aviation? Perhaps so. Unfortunately, the characteristic ambiguity of the UNSC, concerning the legal justification of its acts, leaves this as a polemical issue.

The global community does not have a universally accepted interpretation of Article 3(b). This lack of a common interpretation is certainly problematic. As the representative of Iceland pointed out, because each State can have a different interpretation of Article 3(b), this creates an "open door," resulting in

⁹⁵ See ICAO Doc. A20-1.

⁹⁶ On December 31, 1968, in Resolution 262, the Security Council had condemned Israel for premeditated acts of violence for military action against the Civil International Airport in Beirut.

⁹⁷ See Theodor Meron, *The Martens Clause, Principles of Humanity, and Dictates of Public Conscience*, 94 AM. J. INT'L L. 78 (2000). The Martens Clause limits the use of force to dictating public conscience, having the effect that what is not specifically prohibited is not necessarily legal.

⁹⁸ See Geneva Convention I, *supra* note 69; see also Geneva Convention II, *supra* note 69. Geneva Convention III *supra* note 69, at art. 142; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Oct. 21, 1950, art. 158, 75 U.N.T.S. 287 (hereinafter Geneva Convention IV).

heterogeneity in national air regulations.⁹⁹ The representative of Japan argued that without a clear interpretation of the functional criteria of Article 3, Japan, and most probably others as well, “face a serious problem related to the determination of the status of aircraft, particularly in carrying out activities under the United Nations framework, as well as, the carriage of persons and goods for humanitarian purposes.”¹⁰⁰ The Legal committee of ICAO has done excellent work in attempting to resolve this polemic. The global air community can only benefit from a universally accepted interpretation. If an agreement on the interpretation cannot be established between states, then perhaps an advisory opinion of the ICJ could clarify the issue.

B. ARTICLE 3(D)

This section will analyze the “due regard” rule codified in Article 3(d) of the Chicago Convention. The first section will determine the content of the norm through a tripartite analysis. The second section will examine the application of the norm, again using a tripartite analysis.

1. *Content of Due Regard*

The extent of the obligation of due regard was not elaborated within the text of the Chicago Convention itself. This somewhat obscure principle of what may *prima facie* appear to be legal amphibology has nonetheless been briefly addressed in certain annexes to the Chicago Convention,¹⁰¹ by ICAO in its document, *A Guidance Materials for Aircraft Interceptions*, in the *Manual Concerning Safety Measures Relating to Military Activities Potentially Hazardous to Civil Aircraft Operations*,¹⁰² *Procedures for Air Navigation Services; Rules of the Air and Air Traffic Services*, and finally, within Article 3 of the Chicago Convention.¹⁰³ These texts and treaty dispositions deal with specific applications of the due regard principle. Specific applications include: matters of interception of civil aircraft by military aircraft, the possible use of force against civil aviation, the execution of military operations, which can be dangerous to civil air navigation, and the military/civil

⁹⁹ ICAO Doc. LC/29-wp/2-1 attachment 2, at 19.

¹⁰⁰ *Id.*

¹⁰¹ Specifically, the principle has been addressed in Annexes 2, 6, Parts I and II, 10 Volumes I and II, 11, and 15. These annexes are pursuant to Article 37 of the Chicago Convention.

¹⁰² See ICAO Doc. 9554-AN/932.

¹⁰³ See ICAO Doc. 9436.

communicative interface. Parenthetically, it is important to note that the civil/military communicative interface norms are applicable not only to aircraft but also to the entire air traffic control structure established for military flights. These examples represent an important part of the generic due regard norm because they are specific applications of the genus or species norm of due regard as an international normative principle.

The “due regard” rule remains the principle treaty obligation imposed upon States for the regulation of the flight of military aircraft applicable during times of peace and armed conflict found within the Chicago Convention. This section will first analyze the due regard concept by a textual deconstruction of the codified norm. A preliminary conclusion shall be established pertaining to the content of the due regard obligation.¹⁰⁴ The conclusions of the first level analysis will represent our proffered content of the “due regard” norm. This initial conclusion will also be tested for either confirmation or repudiation through the subsequent two analytical levels.

A second level of interpretation will then follow through the analysis of the application of “due regard” in specific situations as elaborated within various Annexes to the Chicago Convention. The second level will test our initial conclusions by analyzing two issues. First, our analysis will examine principles deduced from presuppositions established in the application of “due regard” in specific circumstances detailed within the Annexes to the Chicago Convention. Second, this section will analyze the civil military interface by scrutinizing the obligations imposed on civil air navigation. This second level of analysis is based on the following two hypotheses. First, elements of “due regard” that are applicable in specific situations must *a fortiori* be encompassed within the *genus* norm, being the general “due regard” principle itself. Second, within the civil/military inter-

¹⁰⁴ Although several methodologies can be used to extract the meaning of a normative text, initially, preference should always be given to the ordinary meaning of the terms used within their context. See *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr.)*, 1994 I.C.J. 112 (July 1); see also *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr.)* 1995 I.C.J. 6 (Feb. 15). Although in this case, the ICJ did apply the ordinary meaning of the terms within their context and thus rejected the use of the *travaux préparatoire* as a supplementary means of interpretation. The dissenting opinion of Justice Schwebel did show that the ordinary meaning does not necessarily yield the best interpretation. Herein lies the reason of our methodology to use alternate methods of interpretation to evaluate our initial conclusions derived from the literal interpretation.

face, the obligations imposed on civil air navigation towards military airspace use represent the civilian mirror image of the due regard norm and can thus, help us in determining the content of its military counterpart.

A third level of interpretation will then examine how the ICAO applies this concept in its documents and resolutions. The third level of analysis will establish the same verification with our initial conclusion and the principles deduced from ICAO general assembly resolutions.

The second and third levels of interpretation will establish a confirmation to our proffered normative content deduced within our first level of interpretation. The denouement of this process is the illation of the genus norm itself of due regard and its constituent obligations. As Aristotle argued within his philosophical system,¹⁰⁵ the form is determined by the totality of the specific attributes of the subject studied. Thus, by establishing the attributes of due regard within our three levels of interpretation, we can deduce the objective normative content of due regard.

a. Exegetical Analysis

What is the plain meaning of Article 3(d)? Within this section we will resolve or reduce the text of the norm into its constituent or component parts, describing their syntactic roles. Thus, a literary deconstruction of Article 3(d) will help to determine the content of the treaty norm.¹⁰⁶ Within the context of the Chi-

¹⁰⁵ "Aristotle believed in real definitions. Definitions were true, or not true, of the thing defined. And a true definition would express the essence of the thing defined. To do so, it is necessary to relate the term being defined to the large class of which it is a member, that is, its genus." See WILLIAM L. REESE, *DICTIONARY OF PHILOSOPHY AND RELIGION: EASTERN AND WESTERN THOUGHT* 29 (1980); see also WILLIAM DAVID ROSS, *ARISTOTLE, A COMPLETE EXPOSITION OF HIS WORKS & THOUGHT* 168 (1960). "To take Aristotle's own instance, the actuality of grammatical knowledge cannot be confined to the grasping of a set of universal laws. The scholar who is interpreting a particular passage is in the fullest sense thinking grammatically. And what is true of this science is true of all. One might go further and say that the actual scientific thought is never concerned with universals cut off from their particulars, but with universals as the universals of their particulars." *Id.*

¹⁰⁶ Vienna Convention on the Law of Treaties, *supra* note 60, at art. 31 ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."). This principle of treaty interpretation was reiterated by the International Court of Justice where the ICJ stated "the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty is to endeavor to give

chago Convention, the word “due” is an adjective and can be interpreted as implying an inherent right.¹⁰⁷ Another connotation of the word “due” can be found in its synonym words “appropriate” or “rightful,” meaning suitable, or more legalistically, “equitable” or “legitimately entitled to.”¹⁰⁸ Syntactically viewed, the word “due” is an adjective qualifying the word “regard.” “Regard” is a noun meaning attention, heed, or care.¹⁰⁹ The word “navigation,” again, a noun, can be defined as the determination of an aircraft’s position or course by geometry or astronomy.¹¹⁰ Furthermore, according to Article 3(d), “States undertake, when issuing regulations for their state aircraft, that they will have due regard.” The due regard norm is thus a formal State undertaking of regulatory content. “Undertake” is a transitive verb meaning to bind oneself to perform, make oneself responsible for, to engage in, or to promise to do.¹¹¹ States have thus accepted an obligation to include a due regard content within their national legal system when promulgating regulations affecting the flight of state, and therefore military aircraft.

Establishing the correct meaning of the word “when” is also very important in analyzing Article 3(d). It is equally important to note that Article 3(d) is also eloquent in what it does not say, especially when one considers the fact that the word “if” is not used. The word “when” can be many things, such as an adverb (interrogative or relative), or a conjunction. In the context of Article 3(d), the word “when” is a relative adverb introducing a

effect to them in their natural and ordinary meaning in the context in which they occur.” See *Competence of the General Assembly for the Admission of a State to the United Nations*, 1950 I.C.J. 4 (Mar. 3) [hereinafter *The Sea and Membership Case*].

¹⁰⁷ The Oxford Dictionary also defines “due” as a noun: a person’s right—what is owed to him and legally demandable. See *THE CONCISE OXFORD DICTIONARY* 297 (7th ed. 1999).

¹⁰⁸ The concept “due” also presupposes a certain conception of justice, as both “desert” and “entitlement” are key components of justice. For an excellent discussion of these concepts, see Lloyd L. Weinreb, *The Complete Idea of Justice*, 51 U. CHI. L. REV. 752 (1984) (stating “a person is due no less and no more than he deserves. Thus, one path towards an understanding of justice is to inquire about desert, and, if desert is not treated simply as a synonym for justice, it furnishes a test of results reached in other ways.”). *Id.* This question is as old as philosophy itself and was the subject of the discussion between Socrates and Thracymachus in Book One of *The Republic* by Plato.

¹⁰⁹ *THE CONCISE OXFORD DICTIONARY* 873 (7th ed. 1999).

¹¹⁰ *Id.* at 675.

¹¹¹ See *id.* at 1169.

subordinate clause expressing time and circumstance, meaning “on the occasion of.” Taken as such, the word “when” presupposes that states will enact a regulatory structure governing the flight of state aircraft. The word “when” excludes the possibility of discretionary regulatory latitude. Thus, the regulation of the flight of state aircraft with a pre-established genus paradigmatic norm of due regard becomes an obligation for contracting states of the Chicago Convention. For states not to have such an obligation, the word “when” of Article 3(d) would have to have been replaced with another word, such as, the word “if” or the word “should.” The word “when” does, however, presuppose a latitude of time for states to issue such regulations. This latitude of time must not be interpreted too broadly because this could result in an unreasonable time lapse, negating the obligation to regulate.

It is therefore, logical and reasonable to conclude that the plain meaning of Article 3(d) creates an obligation on states to regulate state aircraft in order to ensure that state aircraft exercise appropriate attention, as well as, heed and care for the safety of the course and position of civil aircraft avoiding obstruction to the course of and collisions with civil aircraft. Furthermore, as every obligation has a corresponding right, this interpretation presupposes that civil aviation is legitimately entitled to receive this attention, heed, and care.

The subtleties of Article 3(d) continue because it is also important to analyze the use of the word “due” in creating this obligation. The word “due” implies that this obligation results from an inherent right, attributed to civil aircraft, to receive attention, heed, or care to the safety of their course or position from state aircraft. The “due regard” rule thus creates a reciprocal obligation upon the institutions entrusted with the conduct of civil navigation to co-operate with and facilitate in the application of the care, heed, and attention given by military flights to the safety of the course and position of civil aircraft. Furthermore, air navigation authorities must encourage the execution of this obligation towards civil air navigation.

b. Analysis of the Annexes to the Chicago Convention

As a second level of analysis, the Annexes to the Chicago Convention can be very enlightening.

ANNEX 2

Annex 2¹¹² deals with a specific application of “due regard” pertaining to the interception¹¹³ of civil aircraft¹¹⁴ by military aircraft. The purpose of Annex 2 is to ensure safe interceptions. In addition, clear communications aim to reduce possible misunderstandings. Thus, rules of visual communication between military and civil aircraft are established as a universal language of the air. For example, a military pilot can signal to a civilian pilot “you have been intercepted, follow me,”¹¹⁵ or “Land at this aerodrome.”¹¹⁶ The civil pilot may signal his compliance with the order¹¹⁷ or reply by “aerodrome you have designated is inadequate,”¹¹⁸ “cannot comply,”¹¹⁹ or “in distress.”¹²⁰ Contracting

¹¹² It is important to note that Annex 2 has special status as it contains only standards and no recommended practices.

¹¹³ The meaning of the word “interception” within this annex excludes intercept and escort service provided on request to aircraft in distress, which have specific rights according to Article 25 of the Chicago Convention. See Chicago Convention, *supra* note 23, at arts. 25 and 61.

¹¹⁴ Annex 2, § 3.8.1 reads as follows:

Interception of civil aircraft shall be governed by appropriate regulations and administrative directives issued by Contracting States in compliance with the Convention on International Civil Aviation, and in particular Article 3(d) under which Contracting States undertake, when issuing regulations for their State aircraft, to have due regard for the safety of navigation of civil aircraft. Accordingly, in drafting appropriate regulations and administrative directives due regard shall be had to the provisions of Appendix 1, Section 2 and Appendix 2, Section 1.

See ICAO, INTERNATIONAL STANDARDS, RULES OF THE AIR, ANNEX 2 TO THE CONVENTION ON INTERNATIONAL CIVIL AVIATION (9th ed. July 1990) [hereinafter Annex 2].

¹¹⁵ These are precise aerial maneuvers. For example, this specific command is done by “rocking aircraft and flashing navigational lights at irregular intervals (and landing lights in the case of a helicopter) from a position slightly above and ahead of, and normally to the left of the intercepted aircraft (or to the right if the intercepted aircraft is a helicopter) and, after acknowledgement, a slow level turn, normally to the left, . . . on the desired heading.” Annex 2, app. 1 § 2.1, *supra* note 114, at 22.

¹¹⁶ This maneuver can be shown by “lowering landing gear . . . showing steady landing lights and overfly runway in use or, if the intercepted aircraft is a helicopter, overflying the helicopter landing area.” *Id.*

¹¹⁷ The pilot shows compliance by “rocking aircraft, flashing navigational lights at irregular intervals and following.” *Id.*

¹¹⁸ The civil pilot replies by “raising landing gear and flashing landing lights while passing over runway in use. . . .” *Id.* at app. 1 § 2.2.

¹¹⁹ The civil pilot shows non-compliance by “regular switching on and off of all available lights but in such a manner as to be distinct from flashing lights.” *Id.*

¹²⁰ The civil pilot shows distress by “irregular flashing of all available lights.” *Id.*

states are urged to assure that their military pilots strictly adhere to specific signals when intercepting civil aircraft.¹²¹ These standards of aircraft interceptions apply to national airspace and within international airspace over the high seas.¹²²

Annex 2 also establishes the contents of a flight plan,¹²³ which are:

- Aircraft identification
- Flight rules and type of flight
- Number and types of aircraft and wake turbulence category
- Equipment
- Departure aerodrome
- Estimated off-block time
- Cruising speed(s)
- Cruising level(s)
- Route to be followed
- Destination aerodrome and total estimated elapsed time
- Alternate aerodrome(s)
- Fuel endurance
- Total number of persons on board
- Emergency and survival equipment
- Other information.

Annex 2 describes several situations when a flight plan must be deposited for civil air navigation. One of the stated reasons for depositing a flight plan is the requirement by the appropriate ATS authority in order to facilitate co-ordination with military units, to avoid the possibility of interception.¹²⁴

ANNEX 10¹²⁵

Annex 10 contains provisions regulating aeronautical communications, navigation, and surveillance. Strictly speaking, Chicago system state aircraft are not directly bound by these rules. Military and other Chicago state aircraft must, nonetheless, ex-

¹²¹ See Annex 2, *supra* note 114, at § 3.8.1.

¹²² "The [ICAO Council] resolved, in adopting Annex 2 in April 1948 and Amendment 1 to the said Annexes in November 1951, that the Annex constitutes *Rules relating to the flight and manoeuvre of aircraft* within the meaning of Article 12 of the [Chicago] Convention. Over the high seas, therefore these rules apply without exception." See *id.* § 2.1.1.

¹²³ See *id.* § 3.3.2.

¹²⁴ *Id.* § 3.3.1.1 (d).

¹²⁵ ICAO, INTERNATIONAL STANDARDS AND RECOMMENDED PRACTICES, AERONAUTICAL TELECOMMUNICATIONS, ANNEX 10 TO THE CONVENTION ON INTERNATIONAL CIVIL AVIATION, vol. III (1st ed. 1995) [hereinafter Annex 10].

ercise due regard towards Annex 10 operations by not interfering with civil aeronautical navigation, communication, and surveillance.

ANNEX 11¹²⁶

Annex 11 contains within its Chapter 2, certain dispositions for coordination between military authorities and civilian ATS.¹²⁷ Annex 11 Standards and Recommended Practices are applicable not only within the airspace under the jurisdiction of a contracting state where ATS are provided, but also wherever a contracting state accepts the responsibility of providing air traffic services over the high seas or in airspace of undetermined sovereignty.¹²⁸ The subsections of section 2.1b of Annex 11, which are of prime importance to this analysis in establishing the military/civil interface, are as follows:

2.16.1 Air traffic services authorities shall establish and maintain close co-operation with military authorities responsible for activities that may affect flights of civil aircraft.

2.16.2 Co-ordination of activities potentially hazardous to civil aircraft shall be effected in accordance with 2.17.

2.16.3 Arrangements shall be made to permit information relevant to the safe and expeditious conduct of flights of civil aircraft to be promptly exchanged between air traffic services units and appropriate military units.

2.16.3.1 Air traffic services units shall either routinely or on request, in accordance with locally agreed procedures; provide appropriate military units with pertinent flight plan and other data concerning flights of civil aircraft . . .

2.17.1 The arrangements for activities potentially hazardous to civil aircraft, whether over the territory of a State or over the high seas, shall be co-ordinated with the appropriate air traffic services authorities. The co-ordination shall be effected early enough to permit timely promulgation of infor-

¹²⁶ ICAO, INTERNATIONAL STANDARDS AND RECOMMENDED PRACTICES, AIR TRAFFIC SERVICES, ANNEX 11 TO THE CONVENTION ON INTERNATIONAL CIVIL AVIATION (11th ed. July 1997) [hereinafter Annex 11].

¹²⁷ See generally *id.* § 2.16 (co-ordination between military authorities and air traffic services).

¹²⁸ *Id.* at Foreward; see also ICAO Doc. C-WP/8803, § 2.3.1 ("As formulated, the provisions apply to co-operation within a State as well as to co-operation between military authorities of one State and the ATS authorities of other States, and whether the activities affect flights over the territories of states or over the high seas.").

mation regarding the activities in accordance with the provisions of Annex 15.¹²⁹

Civil air traffic services have an obligation to establish and maintain communications with military flight authorities.¹³⁰

Furthermore, section 2.15.1 of Annex 11 specifically provides that:

Air traffic services units, in carrying out their objectives, shall have due regard for the requirements of the operators consequent on their obligations as specified in Annex 6, and, if so required by the operators, shall make available to them or their designated representatives such information as may be available to enable them or their designated representatives to carry out their responsibilities.¹³¹

We believe that this obligation is reciprocal for military air authorities and forms the important element of the attributes of due regard. This mutual obligation presupposes a state of symbiosis between military and civil air space. Their existence is inextricably linked together. Civil air traffic services need information on military flights and use of air space in order to accomplish their obligations of ensuring safety in air navigation through the coordination of airspace use.¹³² Reciprocally, military authorities need as much information on civil air traffic in order to execute not only their own due regard obligation, but also their obligation of national defense and to reduce and even perhaps, eliminate the need for aerial interceptions.¹³³ The objective sought within this close civil/military cooperation is the avoidance of hazards to civil air navigation and a minimal of interference on the operations of civil flights from state air-

¹²⁹ Annex 11, *supra* note 126 at §§ 2.16.1-2.16.3.1, 2.17.1 (emphasis added).

¹³⁰ “[A]ir traffic services authorities shall establish and maintain close co-operation with military authorities responsible for activities that may affect flights of civil aircraft, and . . . arrangements shall be made to permit prompt exchange of information relevant to the safe and expeditious conduct of flights of civil aircraft.” ICAO Doc. C-WP/8803 § 2.3.1.

¹³¹ Annex 11, *supra* note 126, at § 2.15.1 (emphasis added).

¹³² ATS authorities have an obligation to initiate the promulgation of information forwarded to the aeronautical information service (AIS) of the state, which is responsible for issuing the requisite NOTAM. See ICAO, INTERNATIONAL STANDARDS AND RECOMMENDED PRACTICE, AERONAUTICAL INFORMATION SERVICES, ANNEX 15 TO THE CONVENTION ON INTERNATIONAL CIVIL AVIATION, Chapter 5 (10th ed. July 1997) [hereinafter Annex 15].

¹³³ See Annex 11, *supra* note 126, at ch. 6 (establishes communication standards).

craft.¹³⁴ These underlying principles and objectives help define the “due regard” concept as a genus normative principle of the Chicago system. When military flights are over the high seas, ICAO recommends that the military/civil coordination “should be effected through the ATS authority responsible for the airspace over the State where the organization is located.”¹³⁵ ATS communication facilities must be equipped for rapid and reliable communication with military units.¹³⁶

ANNEX 15

Chapter 5 deals with another specific application of “due regard” in the issuing of a NOTAM.¹³⁷ During certain military operations, a NOTAM is to be issued. Such cases include the following: if there are military exercises which can be hazardous to air navigation,¹³⁸ if there is a possibility of interceptions,¹³⁹ operations of humanitarian relief taken under the auspices of the United Nations, which can affect civil air navigation,¹⁴⁰ and for any other military air operation of operationally significant circumstance.¹⁴¹

Appendix 1 of Annex 15 deals with the content of navigation warnings for military exercises and training areas. Specific information must be included when warning civil air navigation authorities of these activities. Warnings must include the precise description of the airspace during such activity with specific geographical coordinates, including upper and lower limits.¹⁴²

¹³⁴ See *id.* (“[T]he objective of the co-ordination shall be to achieve the best arrangements which will avoid hazards to civil aircraft and minimize interference with normal operations of such aircraft.”).

¹³⁵ *Id.* § 2.17.1.1.

¹³⁶ See *id.* §§ 6.2.2.2.2 (a) and 6.2.2.2.3. “The communication facilities shall include provisions for communications by direct speech permitting communications to be established normally within fifteen seconds, and provisions for printed communications, when a written record is required.” ICAO Doc. C-WP/8803, § 2.4.1.

¹³⁷ A NOTAM is defined as being “[a] notice distributed by means of telecommunication containing information concerning the establishment, condition or change in any aeronautical facility, service, procedure or hazard, the timely knowledge of which is essential to personnel concerned with flight operations.” See Annex 15, *supra* note 132, at ch. 2 (Definitions).

¹³⁸ See *id.* § 5.1.1(1).

¹³⁹ See *id.* § 5.1.1(o).

¹⁴⁰ See *id.* § 5.1.1(w).

¹⁴¹ See *id.* § 5.1.1.3.

¹⁴² See *id.* at App.1, ENR 5.2 (military exercise and training areas).

From the above cited texts, we see that specific applications of the "due regard" norm have stressed the communicative aspect of the rule. Only certain military activities must be disclosed to civil air authorities. It is important to stress that not all military aircraft are subject to disclosure. However, civil air navigation must actively participate in establishing a secure environment for itself by informing the military air authorities of its own activities. The specific application of "due regard" applies a reciprocal obligation of communication between the civil and military air authorities. Furthermore, civil ATS have an obligation to coordinate the hybrid use of airspace. The coordination of airspace use is done in the interest of the greater principles of safety and efficiency of use of a limited area for all those that utilize this medium. This communicative dimension will only gain in importance as civil air transportation greatly expands within the new millennium.

By transporting the attributes of the specific norm to the generic norm, we can deduce the following: First, the genus "due regard" norm possesses an important utilitarian conceptual foundation.¹⁴³ Second, communications represent the essence of the obligation rights and duties of those who use airspace. The exchange of information pertaining to airspace use by those who utilize the medium is thus, intrinsic to the norm and is an indispensable element of "due regard." This, in turn, presupposes a duty within the "due regard" rule to facilitate and encourage the flow of data. The conclusions of this second level analysis are consistent with the conclusions reached by the first level.

c. Analysis of the ICAO Resolutions

As a third level of treaty interpretation, we can examine ICAO resolutions to see how this governing body and its members have perceived Article 3(d).¹⁴⁴ International organizations act

¹⁴³ We see utilitarianism as "[t]he doctrine that the principle of greatest utility should be the criterion in ethical matters, and that the criterion is to be applied to the consequences flowing from ethical decisions." W.L. REESE, *DICTIONARY OF PHILOSOPHY AND RELIGION* 601 (1980). Furthermore, this principle is one of rule utilitarianism. Rule utilitarianism "does not consider the consequences of each particular action but considers the consequences of adopting some general rule." Rule utilitarianism "adopts the rule if the consequences of its general adoption are better than those of the adoption of some alternative rule." See *THE ENCYCLOPEDIA OF PHILOSOPHY* 206 (Paul Edwards ed., 1972).

¹⁴⁴ Vienna Convention on the Law of Treaties, *supra* note 60, at art. 31(3)(b). Article 31(3)(b) states: "[t]here shall be taken into account, together with the

and speak through resolutions. One must, however, determine the legal value of these resolutions.¹⁴⁵ Resolutions of international organizations are not included within Article 38 of the Statute of the International Court of Justice as a source of international law. Resolutions can be used as evidence of *opino iuris et necessitatis* in the establishment of international customary law. Resolutions by an international organization pertaining to the interpretation of its constitutive documents can be authoritative in establishing the accuracy of treaty interpretation.¹⁴⁶

ICAO Assembly Resolutions A14-25, A21-21,¹⁴⁷ and 32-14 Appendix P deal with civil and military air traffic. The second consideration of resolution A21-21 specifically mentions the obligation of States to include, within their regulatory structure for State aircrafts, due regard for civil air navigation.¹⁴⁸ Resolution 32-14 Appendix P reiterates this principle.¹⁴⁹ In both resolutions, the ICAO Assembly stresses that the use of common air space must be structured as to assure the safety, regularity, and efficiency of international air traffic. It is important to note that ICAO Resolution 32-14 also encourages Contracting States to take the necessary initiative to improve the coordination between civil and military flights.¹⁵⁰ Furthermore, Appendix P of ICAO Resolution 32-14 stresses the application of Annex 2 in international air space.¹⁵¹ We believe that these ICAO resolu-

context. . . . any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."

¹⁴⁵ For an interesting analysis, see Oscar Schacter, *Law-Making in the United Nations*, in PERSPECTIVES ON INTERNATIONAL LAW 120-137 (Nardasiri Jasentuliyana ed. 1995).

¹⁴⁶ "When an organization is empowered to take decisions by majority vote, it is inevitable that the practice supported by the majority of the member states will come to be regarded as the practice of the organization itself, and will be used as a means of interpreting the treaty setting up the organization, despite the fact that the practice in question is opposed by a minority of the member states." PETER MALANCZUK, *AKELURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 366 (7th ed. 1997).

¹⁴⁷ Although Resolution A 21-21 is no longer in force, its substance remains in Resolution 3214, Appendix P.

¹⁴⁸ See ICAO, ASSEMBLY RESOLUTION A 21-21.

¹⁴⁹ Article 2 of Appendix P states "the regulations and procedures established by Contracting States to govern the operation of their State Aircraft over the high seas shall ensure that these operations do not compromise the safety, regularity and efficiency of international civil air traffic and that, to the extent practicable, these operations comply with the rules of the air in Annex 2." ICAO Doc. 9554-Arv/932.

¹⁵⁰ See ICAO, ASSEMBLY RESOLUTION 32-14.

¹⁵¹ See *id.* at app. P.

tions confirm our parsing of Article 3(d). The fact that these principles were reiterated in two resolutions leaves no doubt—ICAO perceives the due regard norm as an essential obligation in creating safer skies.

Another ICAO document that helps to decrypt the “due regard” concept is the *Manual Concerning Safety Measures Relating to Military Activities Potentially Hazardous to Civil Aircraft Operations*.¹⁵² Although this document elaborates specific rules for particular situations, the document is, nonetheless, very enlightening in showing the importance of ATS-civil-military obligations and the respective duties of all parties to facilitate this communicative interface. According to this document, certain military activities are considered significantly dangerous to civil navigation.¹⁵³ ICAO stresses that such military operations should be coordinated with ATS authorities. Furthermore, when military activities can pose a danger to civil air navigation, ATC authorities must remain alert and react accordingly in coordinating air traffic and reduce risks.¹⁵⁴ Again, this document is germane to our interpretative argumentation.

*The Procedures for Air Navigation Services — Rules of the Air and Air Traffic Services (PANS-RAC)*¹⁵⁵ is also applicable to the military/civil interface. This document is complementary to the Standards and Recommended Practices of Annex 2 *Rules of the Air*, and to Annex 11 *Air Traffic Services*, and when necessary, is supplemented by regional procedures.¹⁵⁶ Procedures for Air Navigation Services (PANS) are approved by the Council and

¹⁵² ICAO Doc. 9554-AN/932.

¹⁵³ These military activities are listed in section 3.2 as follows:

- a) practice firing or testing of any weapons air-to-air, air-to-surface, surface-to-air or surface-to-surface in an area or in a manner that could affect civil air traffic;
- b) certain military aircraft operations such as displays, training exercises, and the intentional dropping of objects or of paratroopers;
- c) launch and recovery of space vehicles; and
- d) operations in areas of conflict, or the potential for armed conflict, when such operations include a potential threat to civil air traffic.

¹⁵⁴ Article 3.2.1 states “ATS authorities should be alert to military operations in areas of conflict, or the potential for armed conflict, when such operations include a potential for hazardous activity, and react accordingly.” *Id.* at art. 3.2.1.

¹⁵⁵ ICAO Doc. 4444-RAC/501.

¹⁵⁶ *Id.* § 1.

are recommended for worldwide application.¹⁵⁷ However, it is important to note that PANS are not subject to the Chicago Convention Article 38 notifications in case of non-implementation.

This document acknowledges that some military aeronautical flight operations may require non-compliance with established air traffic procedures. In order to maintain safe skies, it is recommended that in such cases the appropriate military authorities shall be asked, whenever practicable, to notify the proper civil air traffic control unit before the execution of such maneuvers.¹⁵⁸ Furthermore, section 6.2 applies this principle to aircraft separation stating “a reduction of separation minima required by military necessity or other extraordinary circumstances shall only be accepted by an air traffic control unit when a specific request in some recorded form has been obtained from the authority having jurisdiction over the aircraft concerned.”

It is important to stress that section 6.2 would not apply during times of armed conflict. Furthermore, it is interesting to note the use of the concept “military necessity” within this section. Military necessity was defined within the *Hostage Case* in 1948 as “[m]ilitary necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life and money.”¹⁵⁹

Military necessity is a legal justification for extraordinary actions during armed conflict. The concept of military necessity by definition cannot be subject to prior written approval by civil authorities. Although we certainly understand the concern for separation minima during times of peace, the wording of this disposition should be reviewed. Nonetheless, the fact that within this document extraordinary circumstances justifying the use of military necessity is subject to a communication protocol with ATS authorities indicates the importance the ICAO Council places upon civil/military communications to ensure safer skies.

¹⁵⁷ The procedures are different for Standards and Recommended Practices, which are subject to Articles 37 and 90 of the Chicago Convention.

¹⁵⁸ ICAO Doc. 4444-RAC/501, § 6.1.

¹⁵⁹ 11 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 275 (1989); see also Burrus M. Carnahan, *Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92 AM. J. INT'L L. 213 (1998).

Lastly, section 6.3 deals with large formation military flights.¹⁶⁰ In such cases, arrangements for the reservations of the use of airspace should be made between the military user and the appropriate ATS authority. This coordination is to be made according to Annex 11 with publications of such uses in conformity with Annex 15.

Despite the unfortunate use of the concept of “military necessity” within this document, the text, nonetheless, corroborates the importance of precise and timely communication between military and civil air traffic authorities in creating safe skies. This third level of analysis corroborates the first two.

2. *Application of Due Regard*

This note will now analyze the application of the due regard norm. We will use a tripartite analytical methodology to review the application of the due regard norm. First, the legal form will be analyzed, that is, how is this obligation of States to be executed? Second, the physical dimension of its execution will be analyzed, that is, spatially, where does this obligation apply? And third, the manner or methods in which the obligation is to be executed will be analyzed.

a. How is Due Regard Applied?

How is this obligation of “due regard” executed? First, as a question of form, Article 3(d) stipulates that the “due regard” norm must be included within a State’s regulations.¹⁶¹ The word “regulation” can be defined as being “[t]he act or process of controlling by rule or restriction” and “[a] rule or order, having legal force, issued by an administrative agency or a local government.”¹⁶² We believe that the word “regulation” must be subject to a broad interpretation in order to include military orders, including rules of engagement given by the military hierar-

¹⁶⁰ See ICAO Doc. 4444-RAC/501, § 6.3.

¹⁶¹ See Chicago Convention, *supra* note 23, at art. 3(d).

¹⁶² BLACK’S LAW DICTIONARY 1289 (7th ed. 1999). The Interpretation Act of Canada R.S.C. Ch. I-21, defines the word “regulation” as including:

[a]n order, regulation, rule, rule of court, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established in the execution of a power conferred by or under the authority of an Act, or by or under the authority of the Governor in council.

This definition has a drafting lacunae and is somewhat circular as it is included within the definition the word being defined.

chy to its pilots and air traffic controllers. Military institutions have a specific form of regulatory structure called orders or mission accomplishment rules. We argue that a restrictive interpretation excluding the application of Article 3(d) to military orders would reduce in an unreasonable manner the scope of applicability of the said article, negatively affecting the safety of civil air navigation. Considering the preamble to the Chicago Convention, a broad interpretation of this norm, assuring the maximum applicability of safety, is *de rigueur*.¹⁶³ Canada and the U.S. have applied a broad interpretation incorporating the due regard norm within military orders.

b. Where is Due Regard Applicable?

Where is this obligation applicable? The obligation of due regard is to be executed within international air space. The question, however, remains as to whether or not this obligation of regulatory content also extends to the regulation of State aircraft within national air space. Article 3(d) does not distinguish different physical areas of applicability of the “due regard” obligation. The answer to this question resides in the breadth of the interpretation one gives to Article 3(d). A restrictive interpretation would limit the extent of this obligation to only international air space. After all, Article 1 of the Chicago Convention codifies a customary norm that a “State has complete and exclusive sovereignty over the airspace above its territory.”¹⁶⁴ On the other hand, an expansive interpretation would apply the “due regard” norm to regulatory structures governing national airspace. International practice has not established a consensus on this interpretative debate.¹⁶⁵ We, however, believe that an ex-

¹⁶³ Chicago Convention, *supra* note 23, at pmb1.

¹⁶⁴ *Id.* art. 1.

¹⁶⁵ USAF practice indicates the use of a restrictive interpretation, applying Article 3(d) to only international air space. According to Air Force Instructions 13-201 dated April 1 1998, by order of the Secretary of the Air Force, the “due regard rule is not applicable for territorial airspace of any nation or state, International Straights overlapped by territorial seas, Archipelago Sea Lanes or Contiguous zones.” The ICAO *Manual Concerning Safety Measures Relating to Military Activities Potentially Hazardous to Civil Aircraft Operations* proffers an expansive interpretation in Article 3.1:

Co-ordination between the responsible military authorities and the appropriate ATS authorities is essential to the safety of civil aircraft operations whenever activities potentially hazardous to such operations are planned and conducted by any military units. The “appropriate ATS authority” is, by definition, “the relevant authority designated by the State responsible for providing air traffic services

pansive interpretation is more consistent with the stated goals of the Chicago Convention as indicated within the preamble.

c. Methods of Executing Due Regard

What are the manners and methods of executing due regard? In analyzing the practice of States, we see that there are two manners in which military aircraft have been instructed to exercise due regard while in international airspace. A military pilot can either operate independently of air traffic controllers or act as his own air controller,¹⁶⁶ ensuring proper separation between his aircraft and civil aircraft within his area of operation. Or as a second option, a pilot may function in a synergy with civil air control authorities.¹⁶⁷ We believe that the choice of method of

in the airspace concerned. This co-ordination is necessary regardless of whether the activities take place over the territories of States, over the high seas, or over territories of undetermined sovereignty, and whether the military and ATS authorities belong to the same or different States.

ICAO Doc. 9554-AN/932 art. 3.1

¹⁶⁶ See *Use of Airspace by U.S. Military Aircraft and Firings Over the High Seas*, Department of Defense Directive Number 4540.1 (January 13, 1981).

Article 5.3.2.1 states:

Generally there are operational situations that do not lend themselves to ICAO flight procedures such as: military contingencies; classified missions; politically sensitive missions; or routine aircraft carrier operations or other training activities. Operations not conducted under ICAO flight procedures are conducted under the "due regard" or "operational" prerogative of military aircraft and are subject to one or more of the following conditions:

5.3.2.1.1. Aircraft shall be operated in visual meteorological conditions; or

5.3.2.1.2. Aircraft shall be operated within radar surveillance and radio communications of a surface radar facility; or

5.3.2.1.3. Aircraft shall be equipped with airborne radar that is sufficient to provide separation between themselves, aircraft they may be controlling, and other aircraft; or

5.3.2.1.4. Aircraft shall be operated outside controlled airspace.

5.3.2.2 The above conditions provide for a level of safety equivalent to that normally given by ICAO air traffic control agencies; and fulfill U.S. Government obligations under Article 3 of the Chicago Convention of 1944 (reference (d)), which stipulates there must be "due regard for the safety of navigation of civil aircraft" when flight is not being conducted under ICAO flight procedures. Essentially, flight under the "due regard" or "operational" option obligates the military aircraft commander to be his own air traffic control agency and to separate his aircraft from all other air traffic.

¹⁶⁷ See Air Force Instruction 13-201 1, § 1.7.3 (April, 1998) ("when possible, accomplish prior coordination for "Due Regard" with the agency responsible for

execution must be determined by whether we are dealing with times of unclassified peacetime operations or times of armed conflict when using mission accomplishment rules, which necessarily presupposes a degree of secrecy of the operation, or during peacetime classified military operations.¹⁶⁸ Furthermore, Article 3(d) must be interpreted in harmony with other norms of international public law. The right of States to collective or individual self-defense is now a well-established norm conventionally articulated within Article 51 of the Charter of the

providing air traffic services.”). See also Department of Defense Directive Number 4540.1, art. 5 (Jan.13, 1981).

OPERATING PROCEDURES

5.1. *Selection of Operating Areas.* Flight Operations shall be conducted away from high density air traffic areas, when possible. Areas for aircraft and firing activities shall be so selected as not to interfere with established air routes and ocean shipping lanes. In establishing firing exercise areas, every effort shall be made to confine activities to warning areas, altitude reservations (stationary or moving), other special-use airspace, or any other combination thereof. Arrangements for airspace or altitude reservations shall be made through the appropriate airspace or altitude reservation facility such as Central Altitude Reservation Facility (CARF), European and Pacific CARF. The *Manual Concerning Safety Measures Relating to Military Activities Potentially Hazardous to Civil Aircraft Operations* states:

The first step in the normal co-ordination process is the transmission, or delivery, of a message to the appropriate ATS authority or authorities containing details of the planned activity. This message should describe the nature of the activity, the geographical area(s) affected, including its horizontal and vertical dimension(s), the proposed date(s), time(s) and duration(s) of the activity, and any special safety measures to be taken if necessary, and the means and methods of co-ordination between participating military units and ATS units concerned, including use of radio communications. In other words, a flight plan.

ICAO Doc. 9554-AN/932 art. 3.6.

¹⁶⁸ As an example, the U.S. Department of Defense applies this principle in the following manner:

4.2. It is the policy of the Department of Defense that all U.S. military aircraft and firings shall operate with due regard for the safety of all air and surface traffic. Further, when practical and compatible with the mission, U.S. military aircraft operating on the high seas shall observe:

4.2.1 International Civil Aviation Organization (ICAO) flight procedures.

4.2.2 Reasonable warning procedures with regard to military aircraft of all nations and the Soviet Union, in accordance with U.S. – U.S.S.R. agreement, See Department of Defense Directive Number 4540.1 January 13, 1981.

United Nations. Article 3(d) does not modify the right of self-defense in any way. Military air operations are an important aspect of self-defense of States. Thus, Article 3(d) cannot be interpreted in a manner, which would reduce the efficacy of air operations in the defense of States. Nonetheless, the "due regard" rule must still be part of mission accomplishment rules during military operations. Furthermore, one must consider the efficacy of these methods with the proper operation of civil aviation as determined within the Chicago Convention. Depositing a flight plan with ATC authorities during peace time when flying in international airspace, allows both civil and military aircrafts to efficiently execute their respective rights and duties resulting from international law while being supervised and coordinated by a single air control authority.¹⁶⁹ In order to achieve this operational efficiency, we argue that the "due regard" rule must be interpreted in function with the preamble¹⁷⁰ of the Chicago Convention, which reads:

Whereas it is desirable to avoid friction and to promote that cooperation between nations and peoples upon which peace of the world depends;

Therefore, the undersigned governments having agreed on certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner and that international air transport services may be established on the basis of equality of opportunity and operated soundly and economically . . .

The choice of method of execution of the "due regard" obligation must be, given the conditions existing at the time, the most secure and economically viable, while simultaneously respecting the rights of States to defend themselves. The optimal manner of executing this obligation is in cooperation with civil authorities, unless mission accomplishment rules or other national security imperatives prevent this from happening. For ex-

¹⁶⁹ On this issue, see ICAO Doc 8027-C/920, Action of the Council, 37th Sess. 18.

¹⁷⁰ See Chicago Convention, *supra* note 23, at pmbl. (emphasis added).

- Article 31: 1. Vienna Convention on the Law of Treaties "A Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble.

ample, if there is going to be an aerial bombing of a belligerent State, one cannot reasonably expect that a flight plan will be deposited with civil authorities. In this case, the pilot will be his own flight controller and assure proper separation. On the other hand, a military aircraft conducting an unclassified routine flight should deposit a flight plan with civil navigation authorities as a due regard for civil navigation. In knowing the position and course of military flights, civil navigation authorities can better assure the security of civil air navigation.

IV. CAA-CANADA LITIGATION

International air traffic control authorities have the right to charge civil aviation for the use of their navigational services as required by Article 15 of the Chicago Convention.¹⁷¹ What is the legal status of military aircraft in regards to the fees contained within Article 15 of the Chicago Convention?

¹⁷¹ Every airport in a contracting State which is open to public use by its national aircraft shall likewise, subject to the provisions of Article 68, be open under uniform conditions to the aircraft of all the other contracting States. The like uniform conditions shall apply to the use, by aircraft of every contracting State, of all air navigation facilities, including radio and meteorological services, which may be provided for public use for the safety and expedition of air navigation. Any charges that may be imposed or permitted to be imposed by a contracting State for the use of such airports and air navigation facilities by the aircraft of any other contracting state shall not be higher, (a) As to aircraft not engaged in scheduled international air services, than those that would be paid by its national aircraft of the same class engaged in similar operations, and (b) As to aircraft engaged in scheduled international air services, than those that would be paid by its national aircraft engaged in similar international air services.

All such charges shall be published and communicated to the International Civil Aviation Organization: provided that, upon representation by an interested contracting State, the charges imposed for the use of airports and other facilities shall be subject to review by the Council, which shall report and make recommendations thereon for consideration of the State or States concerned. No fees, dues or other charges shall be imposed by any contracting State in respect solely of the right of transit over or entry into or exit from its territory of any aircraft of a contracting State or persons or property thereon.

Chicago Convention, *supra* note 23, at art. 15.

The Civil Aviation Authority¹⁷² (CAA) deposited proceedings in the Federal Court of Canada, Trial Division, on September 10, 1998,¹⁷³ claiming the right to collect unpaid fees from the Canadian federal government for air navigation services made available by the CAA to Canadian military aircraft.¹⁷⁴ According to the Statement of Claim, the fees claimed by the CAA included "information, direction, and other facilities issued or provided in connection with the navigation or movement of aircraft over the North Atlantic."¹⁷⁵

A. CAA ARGUMENTS

In justifying its claim, the CAA proffered several arguments. Briefly stated, the CAA argued that the service charges established by Shanwick Oceanic were not taxes but actually fees that were charged "to defray the costs of providing facilities and services for aircraft flights over the high seas."¹⁷⁶ It states:

More particularly, it is inherent to the system established by the Chicago Convention and the instruments elaborated thereunder that, in relation to the CAA as the designated ATC authority for Shanwick Oceanic, aircraft operators intending to fly in Shanwick Oceanic shall, in compliance with the domestic law of the country of the aircraft, file or cause to be filed flight plans with the CAA, shall make use of the CAA services within Shanwick Oceanic and, more particularly in this respect, shall, inter alia, obtain CAA clearance upon entering Shanwick Oceanic, abide by CAA ATC instructions (including standing instructions contained in the CAA NA-MNPS), provide position reports to the CAA ATC authority and maintain continuous radio watch within Shanwick Oceanic.¹⁷⁷

The U.K. laws did not require foreign aircraft to submit to the CAA air traffic control services while over the high seas. Rather,

¹⁷² A corporate body, with jurisdictional status and capacity established under and continued pursuant to the laws of the United Kingdom of Great Britain and Northern Ireland.

¹⁷³ See Court File Number T-1772-98. A statement of claim had previously been deposited before the Superior Court of Québec in Montreal. CSM 500-05-021967-961.

¹⁷⁴ These proceedings have now been discontinued. Although the settlement presently remains classified, Canada will no longer be receiving bills from the CAA and will not pay the past ones. Despite the discontinuance, an analysis of the respective arguments remains useful.

¹⁷⁵ Statement of Claim T-1772-98, p. 3 para. 10.

¹⁷⁶ *Id.* at 10.

¹⁷⁷ *Id.* at 9-10.

it is argued that it is the domestic law of the country of the aircraft that provides for such action.¹⁷⁸ Under Regulation 6 of the Civil Aviation Regulations, which was adopted under the authority of the CAA Act, the operator of every aircraft that flies within the Shanwick Oceanic Control Area and in respect of which, a flight plan is communicated to the appropriate air control unit in relation to its flight in that area, shall pay to the CAA, for the navigation services made available by its in relation to that flight, a charge.¹⁷⁹

In Canada, under the Canadian Forces Flying Orders, “[m]ilitary assignment permitting, aircraft in international airspace shall comply with the SARPs of the ICAO.”

Section 5 provides that: “operation of Canadian Forces aircraft and military aircraft of a foreign state are further governed by procedures and special notices contained in FLIPs, NOTAMs AOs and instructions issued by ATC agencies.”

Thus, the CAA continued its arguments on a contractual basis proffering that by duly communicating appropriate flight plans, by requesting the CAA services, by initiating communications with the CAA, by commanding or otherwise allowing Canadian forces military aircraft to enter Shanwick Oceanic, and by making use of the CAA services with full knowledge of the requirement to pay the CAA service charges, the Canadian Government, as operator of the Canadian Forces military aircraft, in obedience with the requirements of the Canadian federal law, brought itself within the obligation to pay the CAA’s air navigation service charges.¹⁸⁰

Therefore, the relation created was claimed to be contractual in nature, and the Canadian Government had freely and voluntarily, contractually bound itself to pay the navigation charges to the CAA.¹⁸¹

In the alternative, the CAA argued that using the CAA services and not paying for the services consumed had unjustly enriched the Canadian Government to the detriment of the CAA.¹⁸² The CAA further argued that the payment of fees for air navigation services over international air space had been accepted by inter-

¹⁷⁸ *Id.* at 11.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 22.

¹⁸¹ *See* Statement of Claim T-1772-98, p.3 para. 106.

¹⁸² *See id.* at 23.

national practice of states and listed a number of states, which had in fact paid these fees.

B. DEFENSE BY CANADA

In rebutting the CAA pleadings, Canada argued that this issue was, in fact, a matter of international relations between two sovereign states concerning the status and liability of State aircraft. This issue involved the performance of acts *Iure imperii*, including the rules of customary international law concerning state sovereignty and immunity and the freedom of flight of state aircraft, including military aircraft, over the high seas. The issue was not properly justiciable in domestic courts, and Canada was attempting to resolve the issue through the sole appropriate means, that is, diplomatic channels.

Canada denied that the charges were fees and argued that they were in fact taxes. Canada proffered that the taxes were not applicable to state military aircraft on the grounds of sovereign immunity. Canada refuted CAA's contractually based argument and denied that its domestic laws required military airplanes to purchase CAA services.¹⁸³

Canada insisted on the normative dichotomy created in Chicago between civil and state aircraft. Canada also insisted that the International Civil Aviation Atlantic Airspace Management System is relevant with respect to military aircraft traffic over the North Atlantic region, only insofar as it may accommodate the undertaking of the contracting states to the Chicago Convention found in Article 3(d), to have due regard, when issuing regulations or instructions for State aircraft. Thus, it allows for an optimum use of airspace, with a maximum level of safety for both civil and military flights.¹⁸⁴ Canada further qualified these actions as a policy decision of the Canadian government involving acts of international comity.¹⁸⁵

Canada argued that its practice was consistent with the rules of customary international law. The argument was based on the principles of State sovereignty and immunity, as well as, on the freedom of flight over the high seas. Thus, military aircraft are exempt, barring an international agreement to the contrary, from the imposition and payment, *inter alia*, of charges related

¹⁸³ *Id.* at 10.

¹⁸⁴ *See id.* at 12.

¹⁸⁵ *See id.* at 13.

to the provision or availability of air navigation services in international airspace.

Canada argued that in filing a flight plan, its pilots were exercising due regard, which was an act of international comity¹⁸⁶ not creating any international contractual obligations.

Canada further argued that its military aircraft flying to a foreign state does so for the sole purpose, either in time of peace or war, of the defense of Canada, or of maintaining, training or efficiency of the Canadian Forces. Thus, Canadian military aircraft perform pure acts *Iure imperii*;¹⁸⁷ again, implying sovereign immunity.

C. COMMENTS ON THE ARGUMENTS OF THE CAA

The arguments of the CAA are certainly interesting, but we, nonetheless, believe that these arguments have two fundamental weaknesses. First, the arguments presuppose an erroneous interpretation of the Chicago Convention. Second, they misinterpret certain principles of international public law.

The Chicago Convention is a multilateral treaty edicting norms regulating public State action while also creating international administrative structures. Article 3(d) creates an obligation by states to issue regulations requiring “due regard” by state aircraft toward civil air navigation. The “due regard” rule is a formal undertaking of states of normative content when issuing such regulations. Thus, states have limited their sovereignty, obliging themselves to a specific content when regulating. Latitude of state action has therefore been circumscribed. As an obligation, this public behavior of States is non-discretionary. The issuing of such regulations is the execution of an international treaty obligation. By arguing that state aircraft purchase CAA services when communicating with Shanwick, either by reporting their positions or filing a flight plan during peacetime, the argument presupposes discretionary latitude of action by states. This, in turn, implies that the registry of the flight plan by a military aircraft during peacetime is an optional act, and not a result of the “due regard” obligation.

A “contract” by definition is a consensual phenomenon that presupposes the choice not to contract. Contracts are by their very nature the execution of the free will to bind oneself to the execution of an obligation requiring a meeting of the mind, *con-*

¹⁸⁶ See *id.* at 12.

¹⁸⁷ Statement of Claim T-1772-98, p. 3 para.14.3.

sensus ad idem. Thus, the contractual interpretative paradigm presupposes latitude of action with the freedom not to contract. We argue that a state aircraft, when effecting an unclassified Atlantic crossing during times of peace, does not have, and must not have, such latitude of action to arbitrarily decide not to deposit a flight plan with civil air traffic authorities. The due regard obligation codified in Article 3(d) of the Chicago Convention requires states to enact due regard requiring state aircraft to deposit flight plans in cases such as North Atlantic crossings. Because the deposit of a flight plan and respecting the ensuing flight separation protocols is the optimal way to exercise a treaty obligation, it cannot give rise to contractual ties. If the contract theory is accepted, then ATC authorities could refuse to receive flight plans or other important communications pertaining to the position of state aircraft. Such is not the case. We proffer that a correct interpretation of Article 3(d) obliges States to include in their air regulations the principle of the deposit of flight plans by operating personnel of state aircraft and the subsequent communication of their positions. The ATC must take communications of these in administering civil air navigation. There should be no discretion involved on either side of the equation. Simply put, these are treaty obligations! Furthermore, civil navigation authorities are not only obliged to accept these flight plans but also must facilitate and encourage the execution of the due regard obligation in order to ensure the optimum in co-ordination and safety between civil and military flights.

We argue that accepting the CAA proffered interpretation would unreasonably weaken the content of the "due regard" rule. The weakening of this rule to a discretionary form of state behavior would result in reducing the safety of international civil aviation. The consequence of this reduction in safety is the increased business risk, which in turn negatively affects the economic development of the industry. The result of the CAA proffered interpretation would be contrary to the objectives of the Chicago Convention as stated in the preamble of the treaty. The CAA argumentation should therefore be rejected as incompatible with the Chicago Convention and unreasonable. The communication of a flight plan or reporting of positions by military flights with civil air navigation authorities when passing through international air space must remain as the essence of the content of the "due regard" rule, and remain its preferred method of execution of an international treaty obligation. Fur-

thermore, the contractual model proffered by the CAA ignores other fundamental principles of treaty interpretation.

First, treaties are to be interpreted according to the ordinary meaning.¹⁸⁸ To displace this presumption one must prove that the terms must be used in meaning other than their plain meaning. One way of doing this is by demonstrating the unreasonable consequences that a plain meaning interpretation would yield. The CAA has failed to prove this. Another argument that can be used to repudiate the ordinary meaning methodology is to show semantic ambiguity. This form of argumentation can be quite complex. Semantic ambiguity must not be confused with the generality of terms. Ambiguity is a multiplicity of attributable meanings. Thus, for a text to be ambiguous, it must logically and reasonably convey more than one concept. Such a real ambiguity can justify the repudiation of the plain meaning methodology.¹⁸⁹ Reasons must be put forward to disregard the plain meaning. This principle was clearly stated by the ICJ in the Morocco case: "If the natural sense . . . yields a coherent and reasonable proposition, then this proposition can only be set aside if sufficient evidence is adduced to prove that it could not have been contemplated."¹⁹⁰

Furthermore, within the Iranian Oil Case, the ICJ stated that "it would require special and clearly established reasons"¹⁹¹ to deviate from the ordinary meaning to a treaty text.

¹⁸⁸ See *The Second Membership Case*, 1950 I.C.J. 4 (Mar. 3). The Court considers it necessary to say that the first duty of a tribunal, which is called upon to interpret and apply the provisions of a treaty, is to endeavor to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context that is an end of the matter. If, on the other hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words. *Id.*

¹⁸⁹ As Sir Gerald Fitzmaurice wrote, "It is therefore not sufficient in itself that a text is *capable of bearing* more than one meaning. These meanings must be equally valid meanings, or at any rate, even if one may appear more possible and likely than the other, both must attain a reasonable degree of possibility and probability, not only grammatically but as a matter of substance and sense. Only then, in the words of Lord McNair, will there be a 'real ambiguity in the text.'" Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951-54: Treaty Interpretation and Other Points*, BRIT. Y.B. INT'L L. 203, 216 (1957).

¹⁹⁰ *Rights of Nationals of the United States of America in Morocco* (Fr. v. U.S.), 1952 I.C.J. 176 (Aug. 27).

¹⁹¹ *Id.* at 186-87.

The due regard norm is not an ambiguous text. Certainly, the content of the norm must be ascertained. Perhaps it is ill defined, but it is not ambiguous. Considering the fact that the CAA arguments went against a plain meaning interpretation of the text, the burden of proof would have rested upon the CAA to show the unreasonableness of a textual interpretation of the due regard rule, *actori incumbit probatio*.

Second, there exists a presumption in international law that a treaty be interpreted "so as to give full effect to its purposes."¹⁹² This is called the *principle of effectiveness*, often referred to by courts as *ut res magis valeat quam pereat*,¹⁹³ and is fundamental to interpreting treaties, which are constitutive of international organizations.¹⁹⁴ As Professor Amerasinghe pointed out, the principle of effectiveness has two dimensions:

*The first embraces the rule that all provisions of a treaty must be supposed to have been intended to have significance and be necessary to convey the intended meaning so that an interpretation which reduces some part of the text to the status of a pleonasm or mere surplusage is prima facie not acceptable — 'la règle de l'effet utile.' The second covers the rule that the instrument as a whole, and each of its provisions, must be taken to have been intended to achieve some end and that an interpretation which would make the text ineffective to achieve the object in view is prima facie suspect — "la règle de l'efficacite."*¹⁹⁵

The contractual model proffered by the CAA reduces the effectiveness of the due regard norm in contradiction with both of the above canons of treaty interpretation.

The alternate argument proffered by the CAA, namely that of unjust enrichment was *prima facie* deceptively simple. The argument is in fact complex, multidimensional, and from a tactical perspective, brilliantly placed as a secondary argument. None-

¹⁹² MALANCZUK, *supra* note 146, at 367.

¹⁹³ Briefly stated, according to this principle, "[t]reaties are to be interpreted with reference to their declared or apparent objects and purposes; and particular provisions are to be interpreted so as to give them their fullest weight and effect consistent with the normal sense of the words and with other parts of the text, and in such a way that a reason and a meaning can be attributed to every part of the text. C.F. Amerasinghe, *Interpretation of Texts in Open International Organizations*, BRIT. Y.B. INT'L L. 175, 189 (1994); *see also* Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 244 (Dec. 15).

¹⁹⁴ *See* Reparations for Injuries Suffered in the Services of the United Nations Case, 1949 I.C.J. 174 (Apr. 11); *see also* Amerasinghe, *supra* note 193, at 175-210; R. Bernhardt, *Interpretation in International Law*, in ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW II (1995).

¹⁹⁵ Amerasinghe, *supra* note 193, at 196.

theless, this argument is also fatally flawed. The unjust enrichment argument has a possible tripartite structure. First, the argument can be justified either as invoking general principles of law recognized by civilized nations, or second, as presenting an argumentation of equity *ex aequo et bono*. Third, the argument can be justified as a principle of equitable treaty interpretation.

First, granted, unjust enrichment is a general principle of law recognized by civilized nations and, according to Article 38(1) of the Statute of the International Court of Justice, is a source of international public law.¹⁹⁶ Unjust enrichment is, however, a subsidiary source of law to be used in the event where there is a void in treaty or customary law. Doctrinal analysis places general principles of law recognized by civilized nations as a useful tool in case treaty or customary norms cannot solve the issue. As Professors Barry E. Carter and Phillip R. Trimble authoritatively wrote in referring to these principles: “*Thus, follows, that it is the court which has the discretion which principles of law to apply in the circumstances of the particular case under consideration, and it will do this upon the basis of the inability of customary and treaty law to provide the required solution.*”¹⁹⁷

At best, international courts have shown a parsimonious use of general principles of law recognized by civilized nations. In fact, the ICJ has been timorous to apply general principles of law recognized by civilized nations. References to these principles have been mainly negative, that is, to state their inapplicability within its *rationes decidendi*.¹⁹⁸ For example, within the *Wimbledon Case*,¹⁹⁹ the I.P.C.J. argued that the existence of a treaty norm prevented the Court from applying general principles of private law, namely servitudes. Similarly, within the *Right of Passage Case*, the ICJ determined that the applicability of a lo-

¹⁹⁶ See 6 IRAN-U.S. Cl. Trib. Rep. 149, 168-69. Unjust enrichment is “widely accepted as having been assimilated into the catalogue of general principles of law available to be applied by international tribunals.”

¹⁹⁷ BARRY E. CARTER AND PHILLIP R. TRIMBLE, INTERNATIONAL LAW 171 (3d ed. 1999); see also MALANCZUK, *supra* note 146, at 367 (“This phrase was inserted in the Statute of the Permanent Court of Justice . . . in order to provide a solution in cases where treaties and custom provided no guidance; otherwise, it was feared, the Court might be unable to decide some cases because of gaps in treaty law and customary law.”).

¹⁹⁸ See *Right of Passage Over Indian Territory* (Port. v. India), 1960 I.C.J. 6, 43 (Apr. 12); *AFFAIRE DU PLATEAU CONTINENTAL DE LA MER DU NORD DE 1969*, at 21; *AFFAIRE DU SUD-OUEST AFRICAINE 1966*, at 47 (sources with author).

¹⁹⁹ France, Italy, Japan, and the U.K. v. Germany, 1923 P.C.I.J. (ser. A) No. 1.

cal customary norm prevented further inquiry into the applicability of general principles of law recognized by civilized nations.

*Portugal also invokes general international custom, as well as the general principles of law recognized by civilized nations, in support of its claim of a right of passage as formulated by it. Having arrived at the conclusion that the course of dealings between the British and Indian authorities on the one hand and the Portuguese on the other established a practice, well understood between the Parties, by virtue of which Portugal had acquired a right of passage in respect of private persons, civil officials and goods in general, the Court does not consider it necessary to examine whether general international custom or the general principles of law recognized by civilized nations may lead to the same result.*²⁰⁰

In the dispute between the CAA and the Canadian government, the Chicago Convention would have provided a satisfactory answer to the problem through a correct interpretation of Article 3(d). In the case at hand, proper treaty interpretation thus precludes the conditions required to invoke an alternative source of international public law, such as unjust enrichment.

Second, an unjust enrichment argumentation as an application of equity *ex aequo et bono*, also fails to resist analysis. The purpose of an *aequo et bono* argumentation is to free the court from the constraints of positive norms allowing a court to decide more on the facts than on the law itself. Procedurally speaking, the parties must *a priori* accept that a court can decide *ex aequo et bono*. Although states have never granted such powers to the ICJ, they have accepted this in arbitration cases.²⁰¹ Within the present case, Canada never expected to grant the court powers to settle the case *ex aequo et bono*.

Third, and perhaps the most cogent dimension of the argumentation, unjust enrichment can possibly refer to a form an equitable treaty interpretation.²⁰² However, the ICJ has been prudent in using this interpretative technique. In the *North Sea Continental Shelf Case*,²⁰³ the ICJ had expressed concern that “[a]s the operation of delimiting is a matter of determining areas appertaining to different jurisdictions, it is a truism to say that the determination must be equitable; rather is the problem

²⁰⁰ Right of Passage Case, 1960 I.C.J. at 43.

²⁰¹ See A.J.I.L. 1039, 180; Fisheries Jurisdiction (F.R.G. v. Ice.), 1974 I.C.J. 175 (July 25); Trail Smelter Case, (U.S. v. Can.), 3 R.I.A.A. 1905 (1941).

²⁰² See the decision of Justice Hudson, *Affaire des Prises d'Eau le la Meuse* (Belg. v. Neth.), 1937 I.C.J. 76-78.

²⁰³ *North Sea Continental Shelf* (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 3 (Feb. 20).

above all one of defining the means whereby the delimitation can be carried out in such a way as to be recognized as equitable.”

In the *Fisheries Jurisdiction Case*,²⁰⁴ the ICJ insisted upon reaching an equitable apportionment of fishing resources. However, it must be noted that the ICJ wanted to reach an equitable solution based on the applicable legal norms.

Although the unjust enrichment argument is very interesting and complex, we remain unconvinced as to its cogency. Thus, we believe that the unjust enrichment argument could not have been accepted and would have been rejected.

D. COMMENTS ON THE CANADIAN ARGUMENTS

The determination of whether these charges were in reality taxes in international law is a very interesting and complex debate. If these fees were in fact charges and not taxes, they would then have been applicable to all aircraft. Government aircraft, which are excluded from this definition, would have been subject to these fees. On the other hand, if these fees were in fact taxes, then all state aircraft that are “*qua*” state aircraft, irrespective of their Chicago-type classification, would be exempt from these charges on the grounds of sovereign immunity. We, however, proffer that a debate on this issue is not necessary to resolve the dispute. The case at issue can be solved avoiding the tax polemic through our proffered interpretation of Article 3(d). The definition of what is a tax in international law is beyond the scope of this paper.²⁰⁵ Nonetheless, if these fees were in fact taxes, then the sovereign immunity of state aircraft precludes the imposition of these taxes against military aircraft.

Canada correctly denied the creation of a contractual link when its state aircraft deposit flight plans. The important issue to determine is if a contractual obligation arises when military pilots with international air traffic control authorities deposit a flight plan. If this question were answered affirmatively, then state aircraft would be obliged to pay for services duly consumed by contract. The answer to this question necessarily presupposes both the purposes for which one deposits the flight plans and the basic theory of state contractual relations.

²⁰⁴ *Fisheries Jurisdiction (F.R.G. v. Ice.)*, 1974 I.C.J. 175 (July 25).

²⁰⁵ Nevertheless, it is interesting to note that in Resolution A12-19, the ICAO Assembly describes the amounts that states may collect based on Article 15 of the Chicago Convention as taxes.

Canada's argument stressed the *Jure imperii* concept. We believe that the maintenance of a broad interpretation of *Jure imperii* to military aircraft functions is important. A restrictive interpretation of the concept of military aircraft could negatively affect U.N. charter rights, such as those established concerning inherent right of state to self-defense.²⁰⁶ The interpretative balance of Article 3(b) thus becomes very delicate. The enumerations as a whole must be interpreted restrictively inasmuch as this treaty disposition deals with a tripartite classification of State aircraft consisting exclusively of military customs and police air services. Nonetheless, the military part of the norm in itself must be subject to a broad interpretation.²⁰⁷

Canada's argument on international comity must be reviewed. Comity, or *Comitas Gentium*, *Convenance et Courtoisie Internationale*, *Staatengunst*, are "rules of politeness, convenience, and goodwill,"²⁰⁸ "neighborliness, mutual respect, and the friendly waiver of technicalities."²⁰⁹ These are not rules of law and are therefore, not legally binding. However, in the case at hand, the "due regard" was a treaty obligation specifically involving technical rules for the international safety of civil air navigation, and therefore, could not have been considered as a discretionary rule of comity. To argue that states deposit a flight plan as an act of comity would be to void the due regard treaty obligation of normative content. Granted, a rule of comity can evolve to a customary norm, or be codified within a treaty, but this is not the case. We believe that this second argument involving comity is wrong and must be refused as being contrary to the stated goals of the Chicago Convention. Therefore, we argue that this interpretation should be rejected as unreasonable.

Article 15 of the Chicago Convention implicitly allows states to impose certain charges or fees for the use of airport services and facilities or other services provided to aircraft. However, Article 15 cannot be interpreted as authorizing states to impose

²⁰⁶ See UN CHARTER, art. 51; see also *Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27) (for the relationship between the conventional right of self defense and its customary version).

²⁰⁷ For an excellent review on the right of states to defend themselves, see ALBRECHT RANDELZHOFFER, *ARTICLE 51 IN THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 106 (Bruno Simma et al. eds. 1995).

²⁰⁸ L. OPPENHEIM, *INTERNATIONAL LAW, A TREATISE* 34 (H. Lauterpacht ed., 8th ed., 1991).

²⁰⁹ BROWNLIE, *supra* note 8, at 30.

charges on foreign state aircraft. Article 15 must not be interpreted in isolation. The Chicago Convention, within Article 3(c), expressly reserves to the contracting states all questions relating to authorization for operation of foreign state aircraft. Furthermore, article 3(a) specifically edicts the scope of applicability of the Chicago Convention, limiting it to civil aircraft. Article 15 must therefore be interpreted in conjunction with Article 3(a). According to Professor Cooper, who was chairman of the drafting committee that included Article 3 and commented when explaining the exclusion of state aircraft in the negotiations of the Chicago Convention: "*The position taken at that time was that military aircraft . . . had the character of a political organ removed from every intervention by another power as had a foreign warship in a national port.*"²¹⁰

Thus, not only does the Chicago Convention disallow states to impose fees to state aircraft, but also customary international law prohibits such charges. The Chicago Convention does not have any disposition that specifically changes this customary norm. Like warships, military aircraft have, as a matter of international custom, enjoyed treatment that differs from that of their civilian counterparts. Furthermore, due to the fact that military aircraft benefits from sovereign immunity, military aircraft likewise have a special status under international public law.

Furthermore, the focus Article 15 of the Chicago Convention seems to create a level playing field among commercial flight operators. Article 15 prevents fee discrimination based on nationality concentrating on anti-competitive behavior. A mechanism assuring transparency of fee structures is also established in the last paragraph of Article 15 with the publication and communication requirements to ICAO. The concerns expressed within Article 15 are therefore, not pertinent to the operation of state aircraft. Any attempt to use Article 15 to justify the charging of fees to state aircraft would change the nature and focus of the article and negate the intellectual integrity of the treaty.

Granted, user charges are a recognized and well-accepted method to obtain revenue from aircraft operating within a commercial paradigm to cover costs associated with aviation and airport facilities and services. However, the principle of the inherent equality of a sovereign underlies the argument that

²¹⁰ COOPER, *supra* note 24, at 242-43. The convention as a whole, with the exception of Article 3c and (d), is applicable only to civil aircraft. *See id.* at 306.

governments should not assess charges on other governments. A fundamental principle of international law is that the property of a sovereign used for non-commercial purposes is not subject to seizure, attachment, or execution to satisfy a debt.²¹¹ Nonetheless, if a state aircraft receives certain goods and services, such as fuel, aircraft maintenance, or other supplies, then these certainly should be paid for. Furthermore, the CAA was in the case, disregarding U.K.'s responsibility to provide ATS in the Shanwick F.I.R.

As a final comment on this very interesting case, we will briefly discuss the role of Canadian courts in treaty interpretation.²¹² Within the Canadian constitutional structure, most treaties are implemented by legislation.²¹³ Generally speaking, our executive branch makes treaties and our legislative branch implements treaties. Strictly speaking, Canadian courts interpret domestic laws, not international treaties. Nonetheless, in a recent decision,²¹⁴ the Supreme Court of Canada tackled such an issue. According to Justice Gonthier:

The first comment I wish to make is as follows:

In interpreting legislation which has been enacted with a view towards implementing international obligations . . . it is reasonable for a tribunal, to examine the domestic law in the context of the relevant agreement to clarify any uncertainty. Indeed where the text of the domestic law lends itself to it, one should strive to expound an interpretation which is consistent with the relevant international obligations.

Second, and more specifically, it is unreasonable to make reference to an international agreement at the very outset of the inquiry to determine if there is any ambiguity, even latent, in the domestic legislation. The Court of Appeal's suggestion that recourse to an international treaty is only available where the provision of the domestic legislation is ambiguous on its face is to be rejected.

Justice Gonthie, then cites Ian Brownlie:

If the convention may be used on the correct principle that the statute is intended to implement the convention then, it follows, the latter becomes a proper aid to interpretation, and more especially, may reveal a latent ambiguity in the text of the statute even if this was "clear in itself." Moreo-

²¹¹ See *The Schooner Exch. v. McFaddon*, 11 U.S. 116 (1812).

²¹² An exhaustive analysis of the role of Canadian courts in treaty interpretation is beyond the scope of this article.

²¹³ One possible exception is the defense treaties because these do not affect internal laws.

²¹⁴ See *Nat'l Corn Growers Ass'n v. Canada* (Canadian Import Tribunal), 2 S.C.R. 1324 (Can. 1990).

*ver, the principle or presumption that the Crown does not intend to break an international treaty must have the corollary that the text of the international instrument is a primary source of meaning or "interpretation." The courts have lately accepted the need to refer to the relevant treaty even in the absence of ambiguity in the legislative text when taken in isolation.*²¹⁵

Within its argumentation, the CAA bases its rights on internal Canadian laws, not on the Chicago Convention per se. However, in interpreting the Canadian laws which edict that Canadian military flights are to deposit flight plans with the CAA, the Federal Court must do so in light of the Chicago Convention because these domestic Canadian laws are the implementation of the due regard treaty obligation of Canada.²¹⁶

Due regard is a broad concept, which is difficult to define. However, generality of the terms is not in itself an impediment to interpretation or to its applicability in examining Canadian laws. As J.E.S. Fawcett appropriately wrote on the subject:

. . . a treaty or agreement is recognized as having its own special status and function as an instrument of international laws. Therefore, to the extent that the first principle of the primacy statute does not operate in a particular case, the agreement will be construed by the canons designed to make it as effective as possible in its field of operation.

*A classical statement of these canons is to be found in a Privy Council judgment delivered by Lord Sumner. The interpretation of an international agreement, must he said, take note of the fact that it is expressed in what is by tradition the common language of international intercourse, but it would be unreasonable in the circumstances to expect of it either nicety of scholarship or exactness of literary idiom. . . Where interests conflict much must be allowed to the effects of compromise; where the principles, by which future action is to be guided, are laid down broadly, leaving to the Powers concerned the actual measures to be taken in execution of those principles, it is unreasonable to expect a greater precision than the circumstances admit of, or to reject as incomplete provisions which are expressed without much detail and sometimes only in outline.*²¹⁷

Another interpretive hurdle, however, still remains to be overcome. The Canadian laws obliging the deposit of flight plans

²¹⁵ BROWNLIE, *supra* note 8, at 51.

²¹⁶ See *Schavernoeh v. Foreign Claims Comm'n*, 136 D.L.R. 447 (Can. 1982). The Supreme Court of Canada examined similar issues pertaining to regulations implementing international agreements expressing an opinion consistent with the present argument.

²¹⁷ J.E.S. FAWCETT, *THE BRITISH COMMONWEALTH IN INTERNATIONAL LAW* 66-68 (1963).

for military transatlantic flights do not specifically mention that this is done in implementation of a treaty obligation. Thus, can a court refer to a treaty in interpreting a domestic law if no mention of the implementation of the treaty in question appears within the law to be interpreted? This issue was directly addressed in *Pan-American Airways v. Department of Trade*,²¹⁸ where in the words of Justice Scarman, L.J., a court may take notice of an international convention when two courses are reasonably open to the court, but he stated:

*One would lead to a decision inconsistent with Her Majesty's international obligations under the convention while the other would lead to a result consistent with those obligations. If statutory words to be construed or a legal principle formulated in an area of the law where Her Majesty has accepted international obligations, our courts – who, of course, take notice of the acts of Her Majesty done in the exercise of her sovereign powers – will have regard to the convention as part of the full content or background of the law. Such a Convention, especially a multilateral one, should then be considered by courts even though no statute expressly or impliedly incorporates it into our law.*²¹⁹

Thus, the omission of reference to the Chicago Convention does not preclude the court from referring to the treaty in interpreting domestic Canadian laws.

V. UNAUTHORIZED OVERFLIGHT

What would be the legal repercussions of an unauthorized overflight of a state by a military or state aircraft? On August 2, 1975, Air Force One was carrying President Ford and received clearance to fly over Sweden en route from Helsinki to Bucharest. Unfortunately, the plane strayed to the east over the restricted area of Karlskroma and was quickly intercepted by a Swedish fighter.²²⁰ If a military aircraft entered the sovereign airspace of another state without proper authorization, the trespassing aircraft could be intercepted and identified, directed to leave, forced to land at a designated airfield, or ultimately have a warning shot fired, and, if necessary, have its flight terminated.

²¹⁸ Lloyds Rep. 257, 261 (1976).

²¹⁹ *Id.*

²²⁰ See J. Sundberg, *Legitimate Responses to Aerial Intruders, The View from a Neutral State*, in 10 ANNALS OF AIR AND SPACE LAW (Nicholas Mateesco Matte, ed., 1955); see also M. Milde, *Interception of Civil Aircraft vs. Misuse of Civil Aviation*, in 11 ANNALS OF AIR AND SPACE LAW (Nicholas Mateesco Matte, ed., 1986); B.E. Donahue, *Attacks on Foreign Civil Aircraft Trespassing in National Airspace*, 30 A.F. L. REV. 49-68 (1989).

The response of the overflowed state must respect the basic norms pertaining to the use of force in international law.

Indeed, the use of force against the military or state aircraft during such violations is a delicate question in peacetime. The rules of proportionality, military necessity, humanity, and chivalry would govern the use of force in a situation²²¹ where a state invokes its right to self-defense²²² to justify the downing of an aircraft during peacetime.

Nonetheless, it is important to stress that Article 3(b) of the Chicago Convention,²²³ which was drafted and codified as a consequence of the regrettable Soviet interception and destruction of Korean Air Flight 007 in September 1983, codifies customary peacetime norms prohibiting the use of force against civil aircraft. Again, a state aircraft, which includes military aircraft, is not subject to this treaty disposition. Nonetheless, according to U.S. interpretation of customary law, with which we agree, international law establishes similar normative standards to those ap-

²²¹ Proportionality is a customary norm of international law pertaining to the use of force during an armed conflict by states. It was codified in the 1977 Protocol Additional I to the Geneva Conventions of August 12, 1949, relating to the Protection of Victims of International Armed Conflict, June 8 1977, arts. 51.5(b) and 57.2(iii). Proportionality balances the military advantage anticipated from the use of force with the collateral damages to civilian and civil objects. In other words, the collateral damage caused by the use of force must not be disproportionate to the military advantage sought. For a history of the principle of military necessity in American law, see Burrus M. Carnahan, *Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92 AM. J. INT'L L. 213 (1998); see also William Gerald Downey, Jr., *The Law of War and Military Necessity*, 47 AM. J. INT'L L. 251 (1953); Judith G. Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391 (1993); Oscar Schacter, *The Right of States to Use Force*, 82 MICH. L. REV. 1620 (1984); T.K. Plofchan, *Article 51; Limits on Self-Defense?*, MICH. L. REV. 336 (1992). For a more general analysis of the LOAC applicable to air warfare, see Hamilton de Saussure, *Recent Developments in the Laws of Air Warfare*, ANNALS AIR & SPACE L. 33-47; L. C. Green, *Aerial Considerations in the Law of Armed Conflict*, 5 ANNALS AIR & SPACE L. 89-117 (1980).

²²² An act of self-defense must always be both necessary and proportional. "There is a specific rule whereby self-defense would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law." *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226 (July 8) (quoting *Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 94 (July 8)). See also, IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 279 (1981).

²²³ Protocol relating to an amendment to the Convention on International Civil Aviation (Article 3 bis), Montreal, 10 May 1984, 23 I.L.M.. This protocol has not been submitted to the Senate for advice and consent because of concerns about compulsory ICJ jurisdiction. See *The Commander's Handbook*, *supra* note 21, at para. 4.4 n. 35.

plicable to civil aircraft with respect to military aircraft interception²²⁴ when the military aircraft trespasses national airspace by reasons of error, distress, or *force majeure*.²²⁵ In this case, the use of force against the trespassing state aircraft could generate state liability. For example, when an American military aircraft that was over the Behring Straight accidentally penetrated Soviet airspace because of bad weather on June 22, 1955, Soviet planes, in which 11 members of the crew were wounded, intercepted it. The Soviet Union later paid 50% of the damages to the airplane and crew, which amounted to \$724,947.²²⁶ The overflight of sovereign territory by a state aircraft can be justified by reasons of distress or *force majeure* as an exception to the principle edicted in Article 3 of the Chicago Convention. Elementary considerations of humanity not only prevent the use of force in such situations, but also override claims of violation of sovereign airspace.

VI. U.S. DOMESTIC LAW

Article 12 of the Chicago Convention created an obligation for contracting states to enact rules of the air, ensuring that the operation of an aircraft within its territory shall comply with national air traffic rules, or with Annex 2, when operating over the high seas. The United States government executed this duty in Title 14, Part 91 of the Code of Federal Regulations, requiring that operators of an aircraft comply with American operating rules when within American sovereign air space, and that U.S. registered aircraft respect Annex 2 when over the high seas.²²⁷ This norm only applies to civil aircraft. Nonetheless, the American government agreed that American state aircraft, while operating in international airspace, should do so with due regard for the safety of civil aircraft. This position is in conformity with Article 3(d) of the Chicago Convention.²²⁸ Thus, a military aircraft, being a state aircraft, while on military maneuvers in international airspace over the high seas, is not legally bound by

²²⁴ See William J. Hughes, *Aerial Intrusions by Civil Airliners and the Use of Force*, 45 J. AIR L. & COMM. 595 (1980); John T. Phelps, *Aerial Intrusions by Civil and Military Aircraft in Time of Peace*, 107 MIL. L. REV. 255 (1985).

²²⁵ See The Commander's Handbook, *supra* note 21.

²²⁶ MATTE, *supra* note 44, at 140.

²²⁷ 14. C.F.R. § 91.703 (2001).

²²⁸ Chicago Convention, *supra* note 23, at art. 3(d) ("The contracting states undertake, when issuing regulations for their state aircraft that they will have due regard for the safety of navigation of civil aircraft.").

international convention to follow ICAO flight procedures for certain operations, but must, nonetheless, operate under "due regard" of civil aviation during such time.

The DOD has issued policies pertaining to the use of ICAO procedures and military operations over the high seas.²²⁹ All U.S. military aircraft operating over the high seas are encouraged to use ICAO flight rules. A military aircraft operating in international airspace over the high seas is not legally subject to the jurisdiction and control of air traffic control authorities of another state. According to the DOD directives, military aircraft flights are to avoid conflicting with national regulations. Thus, a routine point-to-point U.S. military flight will respect ICAO rules. DOD policy conforms to the aforementioned Article 3(d) of the Chicago Convention, stating that military aircraft flights and all firings shall be done with "due regard" to the safety and navigation of civil aircraft. Furthermore, DOD directives instructs American military air operations in international air space to respect ICAO rules, unless these rules are not practical or contrary to mission accomplishment.²³⁰

VII. INTERNATIONAL MILITARY AIR OPERATIONS

The freedom of navigation on the high seas is a long established right within the *corpus* of maritime law. The Permanent Court of International Justice established in the *Steamship Lotus Case*²³¹ an initial definition of the freedom of navigation over the high seas, arguing that due to the absence of territorial sovereignty over the high seas, states could not purport to exercise jurisdiction over foreign vessels when on the high seas. This issue has been recently addressed in a decision by the International Tribunal for the Law of the Sea.²³² The cause in question

²²⁹ These are stated in DOD Flight Information Publication (FLIP), General Planning, Chapter 6, ICAO; and Chapter 7 Operations and Firings Over the High Seas.

²³⁰ "Operations not conducted under ICAO flight procedures are conducted under the 'due regard' or 'operational' prerogative of military aircraft, subject to one or more . . . conditions . . . [which] . . . provide for a level of safety equivalent to that normally given by ICAO ATC agencies. Flight under these provisions shall be regarded as deviations from normally accepted operating procedures and shall not be undertaken routinely." See *Warning Areas and Offshore Airspace*, 99-3 AIR TRAFFIC BULL. 11 (1999), available at <http://www.faa.gov/ATPubs/ATB/99-3.htm>.

²³¹ The *S.S. Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 25 (Sept. 7).

²³² Article 298 of the U.N. Convention on the Law of the Sea allows states, when signing, ratifying, or acceding to the Convention, to make a declaration in

is the *M/V "Saiga" (No.2) Case, Saint Vincent and the Grenadines v. Guinea*. In rallying with the majority, Justice Laing wrote a separate opinion. Within this opinion, Justice Laing, eloquently analyzed the bases of the freedom of the high seas. Justice Laing wrote the following:

. . . the institution of freedom of navigation is that it is subsumed under the freedom of the high seas, which is itself based and dependent on a broader freedom of maritime communication and intercourse, given the fact that the sea is essentially an indispensable global highway.²³³

. . . propositions that freedom of the high seas and related freedoms subserve the needs of international trade and commerce and that they have been, and remain, an indispensable factor in the development of the world economy and international commerce.²³⁴

Justice Laing further argues that freedom of navigation is a "peremptory norm of the laws of nations," citing the *Corfu Channel Case*. By analogy, this reasoning can easily be applied to air navigation over the high seas. Justice Laing states that this norm is "[a]n obligatory binding norm; a fundamental principle, which has also had great influence on the other branches of international law, particularly space law and the regime of the Antarctic Treaty, and a fundamental principle on international law as a whole."²³⁵

Transatlantic air routes are an indispensable global highway. Furthermore, freedom of air navigation is a necessary subsection of the norm of freedom of communication and intercourse. Justice Laing traces the establishment of this norm to the Atlantic Charter and the post WWII legal system,²³⁶ of which it is important to note the Chicago system is an integral part. Parenthetically, the freedom of air navigation over the high seas is not only an important part of the Chicago system, but also is an important part of the Law of the Seas having been codified in Article

writing to the effect that it does not accept procedures for disputes concerning military activities, including military activities by government vessel and aircraft. This right was exercised by Cape Verde, France, Italy, the Russian Federation, and Tunisia. See United Nations Convention on the Law of the Sea, *supra* note 37.

²³³ *International Tribunal for the Law of the Sea: MN "Saiga" No. 2 Case (St. Vincent v. Guinea)*, 38 I.L.M. 1323, 1404, para. 21 (1999) (opinion of Justice Laing).

²³⁴ *Id.* at para. 23.

²³⁵ *Id.* at para. 27.

²³⁶ *Id.* at para. 28.

87(a) and (b),²³⁷ establishing the freedoms of navigation and overflight on the high seas. Within the exclusive economic zone, these rights are to be exercised, with due regard according to Article 58(3).²³⁸

It is important to note that international airspace over the high seas is also subject to certain rules based on a state's right to defend itself.²³⁹ To argue that state aircraft is free to fly over the high seas as they wish would not only be simplistic but also erroneous. However, considering the importance of air navigational rights over the high seas, military operators must, when planning military air operations that affect air routes over the high seas, exercise due regard for these important rights. This section will analyze the application of due regard during military operations which can affect international civil aviation.

A. SUA

American laws create six types of "special use airspace" areas, which are also known as SUA's. One of these SUA's is called a "warning area."²⁴⁰ A "warning area" air space may contain various types of military air operations ranging from aerial gunnery, bombing, aircraft carrier operations, naval gunfire, missiles, radio jamming, all of which are certainly harmful to both civil and state aviation. These warning areas are usually situated in inter-

²³⁷ See U.N. Convention on the Law of the Sea, *supra* note 37.

²³⁸ This freedom of overflight is of great importance to military operations. According to the U.S. Department of State Report, the U.N. Convention specifically preserves and elaborates the rights of military and commercial navigation and overflight in areas under coastal State jurisdiction and on the high seas beyond. It guarantees passage for all ships and aircraft through, under and over straits used for international navigation and archipelagos. It also guarantees the high seas freedoms of navigation, overflight. LOS Press Statement, *supra* note 78.

²³⁹ See U.N. CHARTER, art. 51.

²⁴⁰ Originally, warning areas were only designated over international waters (beyond the former 3-nautical-mile (NM) limit). When the President extended the territorial sea out to 12NM, the airspace between 3 and 12 NM from the coast was no longer considered international airspace. This immediately caused many existing warning areas to lie partly within domestic airspace, instead of being located totally within international airspace, as called for by the warning area establishment criteria. The issue was further complicated by the FAA's extension of controlled airspace (Class E and Class A) and Part 91, operating rules out to 12 NM because this would have prohibited the DOD from conducting hazardous activities in that 3 to 12 NM segment without either an exemption to the regulations, or the designation of another type of SUA. This situation would have adversely impacted military training and/or prevented access by nonparticipating aircraft to airspace where they have freely operated for years. See *Warning Areas and Offshore Airspace*, *supra* note 3, at 11.

national airspace. According to present international air law structures, a state does not have the legal capacity to prevent flights within warning areas. The purpose of a warning area is to warn nonparticipating aircraft, civil or state, of the probable danger that they might face if they enter the warning area airspace.

B. MARITIME EXCLUSION ZONES

During times of armed conflict, belligerents can establish a maritime exclusion zone. The effect of such zones is to deny or restrict access not only to ships, but also to aircraft of states, which are not parties to the conflict. The establishment of such a zone must be publicly declared. Thus, the establishment of any zone that has the potential of affecting civil air navigation must be notified through the appropriate diplomatic channels to ICAO.²⁴¹ If an airplane enters such a zone, it runs the risk of being attacked. According to the principle of proportionality, such a zone must not exceed what is required for military necessity. For example, during the Falklands conflict, Argentina established a 200-mile zone around the Falklands.²⁴² In establishing such zones, due regard must be given to neutral airplanes, ensuring their legitimate use of international airspace. Thus, the party establishing the said zone must assure safe passage of airplanes through these zones. This is of particular importance if the zone affects international air routes.²⁴³ In this case, belligerents must take necessary measures so that aircraft not involved in the conflict may pass through the zone with minimal risk.²⁴⁴

C. BLOCKADES

The establishment of blockades can also affect civil air navigation. In order for a blockade to be binding, it must be effec-

²⁴¹ *San Remo Manual*, *supra* note 66, at Expl. § 106.6.

²⁴² *Id.* at Expl. § 106.2 (This zone was “probably adequate but its declaration that the entire South Atlantic was a war zone was disproportionate to its defence requirements and would affect shipping unconnected with the conflict.”).

²⁴³ Office of the Judge Advocate General, B-GG-005-027/AF-020 *The Law of Armed Conflict at the Operational and Tactical Level* § 13 (Oct. 1999), available at http://www.dnd.ca.jag/operational_e.html (necessary safe passage through the zone for neutral vessels and aircraft shall be provided: where the geographical extent of the zone significantly impedes free and safe access to the ports and coasts of a neutral state in other cases where normal navigation routes are affected, except where military requirements do not permit).

²⁴⁴ *San Remo Manual*, *supra* note 66, at § 106.3.

tive.²⁴⁵ When a blockade is established, the party establishing the blockade must notify all states of its commencement, duration, and location. ICAO should be notified of blockades that affect international air navigation. According to the 1923 Hague Rules of Aerial Warfare, a private aircraft is open to visit and search and to capture by belligerent military aircraft.²⁴⁶ It is interesting to note that these draft rules also stipulated that public nonmilitary aircraft and private aircraft could be ordered to alight for visit and search,²⁴⁷ but that neutral public non-military aircraft, other than those that are to be treated as private aircraft, are subject only to visit for the purpose of verification of their papers.²⁴⁸ A civil aircraft can be captured if, after a visit and search, it has been determined that they:

- (a) Are carrying contraband;
- (b) Are on a flight especially undertaken with a view to the transport of individual passengers who are embodied in the armed forces of the enemy;
- (c) Are operating directly under enemy control, orders, charter, employment, or direction;
- (d) Present irregular or fraudulent documents, lack necessary documents, or destroy, deface or conceal documents;
- (e) Are violating regulations established by a belligerent within the immediate area of naval operations; or
- (f) Are engaged in a breach of blockade.²⁴⁹

D. ADIZ

Some States have established “air defense identification zones” in international air space.²⁵⁰ These zones are unilaterally established by domestic or municipal law and can extend several

²⁴⁵ Declaration Respecting Maritime Law, Apr. 16, 1856, art. 4, *available at* <http://www.lib.byu.edu/~rdh/wwi/1914m/gene1856.html>.

²⁴⁶ This treaty was never signed but “at the time of their conclusion they were regarded as authoritative.” See ADAM ROBERTS AND RICHARD GUELFF, *DOCUMENTS ON THE LAWS OF WAR* 138 (3d ed. 2000).

²⁴⁷ See Hague Draft Rules, *supra* note 26, at art. 50.

²⁴⁸ *Id.* at art. 51.

²⁴⁹ *San Remo Manual*, *supra* note 66, at § 153.

²⁵⁰ These are defined as follows in 14 C.F.R. § 99.3:

(a) The Air Defense Identification Zone (ADIZ) is an area of airspace over land or water in which the ready identification, location, and control of civil aircraft is required in the interest of national security.

(b) Unless designated as an ADIZ, a Defense Area is any airspace of the United States in which the control of aircraft is required for reasons of national security.

hundred miles over the high seas. Although these zones are not based on any specific treaty dispositions, they are nonetheless consistent with the Chicago Convention.²⁵¹ These zones are necessary to the proper defense of States.²⁵² We believe that these zones have been legitimized by state practice.²⁵³ Nonetheless, the application of ADIZ rules to the flight of an aircraft whose flight path would be from one area of the high seas to another simply transiting through an ADIZ could be problematic.²⁵⁴

E. U.N. CHARTER EXCEPTIONS

In principle, a state or military aircraft may fly over a foreign sovereign territory²⁵⁵ solely on the basis of a special authorization from the overflown state. The only exception to this rule is to be found within the U.N. Charter. The U.N. Charter Chapter VII grants some limited rights of passage of military aircraft through the national airspace of another Member State during a U.N. military action.²⁵⁶ A Security Council decision can also call for overflights of sovereign territory or place limits upon the aerial sovereignty of States. In Resolution 707, dated August 15, 1991, the Security Council determined to ensure compliance

The Canadian ones are known as CADIZ, the American ones are known as Designated Air Defense Identification Zones or ADIZ. There is a Contiguous ADIZ for the continental USA, and a separate ADIZ for Alaska (for Alaska this is also referred to as a DEWIZ Distant Early Warning Identification Zone. See 14 C.F.R. § 99.4. For Guam and Hawaii, see Part 99 Security Control of Air Traffic, 14 C.F.R. § 99 (2001); see also *Air Defense Identification Zones: Creeping Jurisdiction in the Airspace* 18 VA. J. INT'L LAW 485 (1978). Furthermore, "[a]ll of the airspace of the United States is designated as Defense Area except that airspace already designated as Air Defense Identification Zones." 14 C.F.R. § 99.49. The deposit of a flight plan is required before an aircraft may be flown either into, within, or across an ADIZ. 14 C.F.R. § 99.11.

²⁵¹ For an excellent analysis of this issue, see JOHN TAYLOR MURCHISON, *THE CONTIGUOUS AIR SPACE ZONE IN INTERNATIONAL LAW*, 12-18 (1955).

²⁵² For an analysis on the possible remedies for violating ADIZ rules, see William J. Hughes, *Aerial Intrusions by Civil Airliners and the Use of Force*, 45 J. AIR L. & COM. 595 (1980).

²⁵³ Twelve States presently maintain such air defense identification zones. See CARTER & TRIMBLE, *supra* note 197, at 1028.

²⁵⁴ See RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 521 reporters' n. 2.

²⁵⁵ This includes the territorial waters of that State since aircraft do not benefit from the right of innocent passage over the territorial waters of a foreign State as do ships and submarines.

²⁵⁶ U.N. CHARTER, art. 42, para. 1.

with resolution 687 by Iraq established certain methods of verification allowing inspection teams to use:

. . . both fixed-wing and helicopter flights throughout Iraq for all relevant purposes, including inspection, surveillance, aerial surveys, transportation and logistics, without interference of any kind and upon such terms and conditions as may be determined by the Special Commission, and to make full use of their own aircraft and such airfields as they may determine are most appropriate for the work of the commission.²⁵⁷

As a result of this resolution, American U-2 planes flew verification missions over Iraq to ensure compliance.

Furthermore, any decision of the United Nations Security Council pertaining to actions included within Chapter VI²⁵⁸ could also permit overflight of sovereign states. If overflight is a necessary consequence of the Security Council decision, then, according to Article 25 of the U.N. Charter, all member states must abide²⁵⁹ and allow the overflight. Aside from the exceptions found within the U.N. Charter, the guiding principle remains that a state aircraft will have to receive an authorization permitting overflight.²⁶⁰ Such authorization can be done either through diplomatic communications or via a formal bilateral agreement.

F. NO-FLY ZONES

The Security Council may also create no-fly zones within national airspace.²⁶¹ No-fly zones are restrictions imposed upon a

²⁵⁷ S.C. Res. 707, U.N. SCOR, 46th Sess., at para. (e) (1991).

²⁵⁸ U.N. CHARTER, arts. 36 and 37.

²⁵⁹ "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." *Id.* at art. 25.

²⁶⁰ Overflight above international straits is a different issue. An analysis of air space over international straits is beyond the scope of this note. Nevertheless, for an excellent analysis of this issue, see G. Guillaume, *Detroits Internationaux et Detroit Aerien*, 15 ANNALS AIR & SPACE L. 75-97 (Nicholas Mateesco Matte ed. 1990).

²⁶¹ Legal justification for no-fly zones was based upon Security Council Resolutions 678, 687, and 688. For an excellent analysis on the enforcement of no-fly zones, see Michael N. Schmitt, *Clipped Wings: Effective and Legal No-Fly Zone Rules of Engagement*, 20 LOY. L.A. INT'L & COMP. L.J. 727 (1998) ("One of the tools that has been fashioned to coercively compel desired norms of international behavior is the no-fly zone. Its use has challenged traditional notions of sovereignty, while clarifying the operational code regarding those actions, that are appropriate responses to threats to the peace, breaches of the peace, or acts of aggression."). *Id.*

state concerning the use of its own sovereign airspace. After the Gulf War, the Security Council was "gravely concerned with the repression of the Iraqi civilian population"²⁶² in both the northern and southern part of the country. Massive flow of refugees across international borders could threaten international peace and security in the region. The Security Council called upon Iraq to ". . . allow immediate access by international humanitarian organizations to all those in need of assistance in all parts of Iraq and make available all necessary facilities for their operations."

As a result, no-fly zones over Iraqi sovereign territory have actually been created. These operations were baptized "Provide Comfort," "Northern Watch," and "Southern Watch." Being a Chapter VII operation, the consent of Iraq to the no-fly zones was not required. Aircraft engaged in executing humanitarian relief in accordance with Security Council Resolution 688 could, therefore, over fly Iraqi territory without prior authorization from Iraqi national authorities. It is interesting to note that Resolution 688 did not expressly create no-fly zones,²⁶³ but that these became a necessary consequence of the said resolution. Could future Security Council resolutions calling upon a State to allow access by humanitarian organizations be interpreted as creating a right of humanitarian overflight without necessarily creating no-fly zones? Probably so, but the security of these flights must nonetheless be assured. A Chapter VII action necessarily presupposes difficulties with the subject state.

A no-fly zone was also created over Bosnia-Herzegovina to facilitate the delivery of humanitarian aid when military flights by the warring factions over Bosnia-Herzegovina were banned.²⁶⁴ The Security Council expressed deep concern over abuses reported against civilians in prison camps and detention cen-

²⁶² S.C. Res. 688, 46th Sess., 2982d mtg. at 1, U.N. Doc. S/RES/688 (1991).

²⁶³ Neither did the Resolution mention Chapter VII. Nonetheless, its reference to international peace and security is by itself sufficient as the Security Council rarely mentions within its resolution the articles of the Charter, which legitimises its actions. As Michael N. Schmitt cogently argues "[n]either NORTHERN nor SOUTHERN WATCH is a classic Chapter VII operation as envisioned in the Charter, i.e. a response to aggression by one State against another. Instead, they are more closely resemble humanitarian intervention mounted by multinational forces in response to a threat to international stability." Schmitt, *supra* note 261, at 736.

²⁶⁴ The London Conference on the Former Socialist Federal Republic of Yugoslavia, Specific Decisions by the London Conference, Doc. LC/C7 (Aug. 2, 1992), reprinted in 31 I.L.M. 1539 (1992).

ters.²⁶⁵ The Security Council wanted to quickly establish the necessary conditions for the delivery of humanitarian assistance in Bosnia and Herzegovina in conformity with its Resolution 764. Again, in order to ensure the safety of humanitarian flights, the Council established a ban on military flights over Bosnia and Herzegovina. The Security Council considered such a ban as an essential element for safely delivering humanitarian assistance. The Security Council thus decided: “. . .to establish a ban on military flights in the airspace of Bosnia and Herzegovina, this ban not to apply to United Nations Protection Force flights or to other flights in support of United Nations operations, including humanitarian assistance.”²⁶⁶

Citing Chapter VII of the U.N. Charter, the Security Council decided in 1993 that the threat to international peace and security warranted to the extension of the ban established in Resolution 781 to cover “flights by all fixed-wing and rotary-wing aircraft in the airspace of the republic of Bosnia and Herzegovina, this ban not to apply to flights authorized by UNPROFOR . . .”

This Security Council resolution then authorized, in the airspace of Bosnia and Herzegovina, humanitarian flights, along with other flights, that were to be consistent with its resolutions.

G. LAW OF THE SEA NORMS

The U.N. Convention on the Law of the Sea codifies certain norms applicable to military aircraft. Articles 87 and 58 of the U.N. Convention on the Law of the Sea edict that all aircraft benefit from freedom of navigation and overflight over the high seas, including the exclusive economic zone. Furthermore, this right must be exercised with due regard to the rights of all other states. Freedom of overflight presupposes a latitude or scope of action of movement and operation. Military operations necessarily implies for aircraft, among other things, the ability of maneuvering, flight operations, military exercises, intelligence activities, and ordinance firing.

Article 33 of the U.N. Convention allows states to exercise a limited control over the contiguous zone, an area adjacent to the territorial sea. This control is limited to the application of

²⁶⁵ S.C. Res. 770, U.N. SCOR, 47th Sess., 3106th mtg., U.N. Doc. S/RES/3106 (1992).

²⁶⁶ S.C. Res. 781, U.N. SCOR, 47th Sess., 3122nd mtg., U.N. Doc. S/RES/781 (1992).

customs, fiscal, immigration, and sanitary regulations. The contiguous zone is, however, not subject to state sovereignty. Aircraft enjoy the same freedom of navigation and overflight over the contiguous zone as over the high seas.

Concerning Article 33, an interpretative polemic arises over possible restrictions to military exercise, and consequently military training overflights, occurring over the exclusive economic zone. Exercising its rights, according to Article 310 of the U.N. Convention on the Law of the Sea, Brazil declared that it understands that the provisions of the Convention "do not authorize other States to carry out military exercises or maneuvers, in particular those involving the use of weapons or explosives, in the exclusive economic zone without the consent of the coastal State." India,²⁶⁷ Malaysia,²⁶⁸ and Pakistan²⁶⁹ concurred with this restriction of military activities in the exclusive economic zone and issued declarations of interpretation to that effect.

Germany, on the other hand, disagreed with the Brazilian position stating, "[a]ccording to the Convention, the coastal State does not enjoy residual rights in the exclusive economic zone." In particular, the rights and jurisdiction of the coastal State in such Zone do not include the right to obtain notification of military exercises or maneuvers or to authorize them.

Italy concurred with the German position and issued a declaration of interpretation in support of its position. The government of the Netherlands, also sustaining the interpretation of Germany and Italy, cogently argued within its own declaration of interpretation, that:

[t]he Convention does not authorize the coastal State to prohibit exercises in its exclusive economic zone. The rights of the

²⁶⁷ The government of the Republic of India understands that the provisions of the Convention do not authorize other States to carry out military exercises or manoeuvres, in particular those involving the use of weapons or explosives without the consent of the coastal State, in the exclusive economic zone and on the continental shelf.

²⁶⁸ The Malaysian government also understands that the provision of the Convention does not authorize other States to carry out military exercises or manoeuvres, in particular those involving the use of weapons or explosives in the exclusive economic zone without the consent of the coastal State.

²⁶⁹ It is the understanding of the Government of the Islamic Republic of Pakistan that the provisions of the Convention on the Law of the Sea do not, in any way, authorize the carrying out of military exercises or manoeuvres by other States, in particular where the use of weapons or explosives is involved without the consent of the coastal State concerned, in the exclusive economic zone and in the continental shelf of any coastal State.

coastal State in its exclusive economic zone are listed in article 56 of the Convention, and no such authority is given to the coastal State. In the exclusive economic zone all States enjoy the freedoms of navigation and overflight, subject to the relevant provisions of the Convention.

The American position was clearly stated in the U.S. State Department Report to the Senate in 1994, and reads as follows:

Military activities, such as anchoring, launching and landing of aircraft, operating military devices, intelligence collection, exercises, operations and conducting military surveys are recognized historic high seas uses that are preserved by article 58. Under that article, all States have the right to conduct military activities within the EEZ, but may only do so consistently with the obligation to have due regard to coastal State resource and other rights, as well as the rights of other States as set forth in the Convention. It is the duty of the flag State, not the right of the Coastal State, to enforce this "due regard" obligation. The concept of "due regard" in the Convention balances the obligation of both the coastal State and other States within the EEZ.²⁷⁰

This U.S. interpretation also yields an important attribute of the due regard norm, namely that the state having jurisdiction over the aircraft or ship has an obligation to enforce the due regard norm. Taken in this light, the maritime due regard norm is not an act of comity of a discretionary nature, nor is it a contractual obligation. Due regard is a treaty obligation.

Furthermore, the U.S. State department defines the due regard standard of the U.N. Convention on the Law of the Sea as follows:

. . . due regard standard required any using State to be cognizant of the interests of others in using a high seas area, to balance those interests with its own, and to refrain from activities that unreasonably interfere with the exercise of other State's high seas freedoms in light of that balancing of interests. Articles 87, 89, and 90 prohibit any State's attempt to impose its sovereignty on the high seas; they are open to use by all States, whether coastal or land-locked.²⁷¹

Ships of all states enjoy the right of innocent passage through the territorial sea. Nonetheless, Article 19 of the U.N. Convention defines the meaning of innocent passage, having an effect upon ships, which are carrying aircraft. Although aircraft them-

²⁷⁰ For more information, see LOS Press Statement, *supra* note 78, arts. 33-34.

²⁷¹ U.N. Convention on the Law of the Sea, *supra* note 37, at art. 35.

selves do not benefit from rights of innocent passage, this norm, nonetheless, does have an impact on military air operations. The meaning of innocent passage prevents the launching, landing, or taking on board a ship that is exercising a right of innocent passage, of any aircraft,²⁷² any military device,²⁷³ or any aerial operation designed for intelligence gathering.²⁷⁴

Aircraft, however, do benefit from the right of transit passage through a strait,²⁷⁵ which is overlapped by territorial sea²⁷⁶ and which is “*used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.*”²⁷⁷ During the exercise of this specific right of overflight, the flight of the aircraft must be for the purpose of continuous and expeditious transit in a normal mode of operation,²⁷⁸ with the exception of what may be required due to distress or *force majeure*.

An aircraft that exercises the right of transit passage must respect the *Rules of the Air* in accordance with Annex 2 of the Chicago Convention and monitor the internationally designated air-traffic control circuit or distress radio frequency. State aircraft should comply with these safety measures and exercise due regard at all times.²⁷⁹

An aircraft must proceed without delay²⁸⁰ and refrain from using any threat or use of force against the states bordering the

²⁷² *Id.* at art. 19(e).

²⁷³ *Id.* at art. 19(f).

²⁷⁴ *Id.* at art. 19(c).

²⁷⁵ *Id.* at arts. 37 and 38.

²⁷⁶ According to the Department of State report to the Senate:

[r]ecognition of such a right was a fundamental requirement for a successful Convention. With the extension by coastal States of their territorial seas to 12 miles, over 100 straits, which previously had high seas corridors, became overlapped by such territorial seas.

Without provision for transit passage, navigation and overflight rights in those straits would have been compromised.

LOS Press Statement, *supra* note 78.

²⁷⁷ This right is considered by the U.S. government to be fundamental to national security interest. According to the U.S. Department of State Report, “*the United States has consistently made clear throughout its history that it is not prepared to secure these rights through bilateral arrangements. The continuing U.S. position is that these rights must form an explicit part of the law of the sea. Part III of the Convention guarantees these rights.*” *Id.* at 26.

²⁷⁸ U.N. Convention on the Law of the Sea, *supra* note 37, at arts. 38(2) and 39(10) (c).

²⁷⁹ *Id.* at art. 39(3)(a).

²⁸⁰ *Id.* at art. 39(1)(a).

strait.²⁸¹ The exercise of the right of transit passage by military aircraft does not necessarily preclude flights done in combat formation,²⁸² nor does it preclude the launching and recovery of an aircraft from a ship. Flight in combat formation is not necessarily, or even by itself, a threat of the use of force as articulated within article 39(b) of the U.N. Convention on the Law of the Sea. It must be remembered that a threat has several composite elements, not only capacity. Intention to use force is a necessary component of a threat. The illegitimacy of a threat lies in its attempt to use force to affect the sovereignty, territorial integrity, or political independence of a coastal state.²⁸³ Nonetheless, a threat, used as deterrence in conformity to Article 51 of the U.N. Charter is certainly legitimate. Furthermore, combat flight formation can be seen as being incidental to the normal mode of flight permitted in article 39(c) of the U.N. Convention on the Law of the Sea. Finally, the conduct of a military exercise may not suspend transit passage rights.²⁸⁴

The right of transit passage must not be confused with the right of innocent passage in international straits that connect part of the high seas or EEZ with a territorial sea. In this case, a right of overflight does not exist.²⁸⁵

Greece issued an interpretative declaration pertaining to the application of the right of transit passage that can effect air navigation. Greece declared that in a situation where there are numerous spread-out islands, yielding numerous possible straits which serve the same route of international navigation, then the coastal state concerned could designate the route or routes

²⁸¹ *Id.* at art. 39(1)(b).

²⁸² The issue of combat formation of warships was raised in the *Corfu Channel Case*. According to the orders of the British Admiralty of August 10, 1946, ships when using the North Corfu Strait must pass with armement in fore and aft position, which is their normal position at sea during peacetime. Carter & Trimble, *supra* note 197, at 957. Nonetheless, according to the U.S. Department of State Report to the Senate, "for example, submarines may transit submerged and military aircraft may overfly in combat formation and with normal equipment operation; surface warships may transit in a manner necessary for their security, including formation steaming and the launching and recovery of aircraft, where consistent with sound navigational practices." LOS Press Statement, *supra* note 78.

²⁸³ State parties when exercising their treaty rights must refrain from any threat or use of force against the territorial integrity or political independence of any state. U.N. Convention on the Law of the Sea, *supra* note 37, at art. 301.

²⁸⁴ *Id.* at art. 44.

²⁸⁵ One example is the Head Harbour Passage, leading through Canadian territorial sea to the United States Passamaquoddy Bay.

through which ships and aircraft of other nations could pass under the right of transit passage. In exercising the right of route determination, the coastal state would assure that the requirements of international navigation and overflight would be respected, while also assuring the minimum-security criterion for both the transiting aircraft and the coastal state itself.

Military aircraft also benefit from archipelagic sea-lanes passages as edicted in Article 53 of the U.N. Convention. This right is to be exercised for the sole purpose of continuous, expeditious, and unobstructed transit through archipelagic waters. During the passage through archipelagic sea-lanes, warships may carry activities necessary to their security, including the launching and recovery of aircraft.²⁸⁶ It must be stressed that there is no right of overflight through airspace over archipelagic waters outside of archipelagic sea-lanes. Similar to the right of transit passage, military aircraft may exercise the right of archipelagic overflight in combat formation. During the exercise of the right of archipelagic sea-lane passage military aircraft may take the required defensive measures to assure their security.²⁸⁷ Offensive military operations against belligerent forces would, however, not be permitted during archipelagic passage nor could these areas be used as a sanctuary or a base of operations. This right cannot be impeded or suspended by the conduct of military exercises.²⁸⁸ Airplanes must remain within twenty-five miles from either side of a designated axis, and must not approach a coastline closer than 10% of the distance between the nearest islands.²⁸⁹

Article 236 of the U.N. Convention on the Law of the Sea edicts that the norms pertaining to the protection of the marine environment do not apply to military aircraft. Nonetheless, the flag state still has a duty to ensure that aircraft act in a manner that is consistent with the U.N. Convention. Malta presented an interesting interpretative declaration on Article 236, stating that the sovereign immunity of Article 236 does not exonerate a State from the responsibility of damage caused by pollution of the marine environment by military vessels, including aircraft.

Although the U.N. Convention on the Law of the Sea places certain restrictions on the use of force and the use of aircraft

²⁸⁶ See Commander's Handbook, *supra* note 21.

²⁸⁷ CF-JAG Doc. § 8-4, para. 26 (this would include acoustic and electronic surveillance).

²⁸⁸ U.N. Convention on the Law of the Sea, *supra* note 37, at art. 54.

²⁸⁹ *Id.* at art. 53.

that are aboard a ship, it is important to stress that this convention does not purport to alter in any way the U.N. Charter rights to individual and collective self-defense as codified within Article 51. Thus, a military ship and airplane conserves, at all times, the right to use force in self defense when exercising the rights granted within the U.N. Convention on the Law of the Sea. Article 19(2) of the U.N. Convention establishes that the concept of innocent passage must not be prejudicial to the peace, good order, or security of the coastal state, but does not prevent an airplane from defending itself if it is subject to an act of aggression.²⁹⁰

The status of the Canadian Arctic archipelago has been a source of dispute between Canada and the United States. Canada closes its arctic archipelago with the use of strait baselines. Canada thus considers the waters within the baselines, which include the Northwest Passage as internal waters. Consequently, the airspace above is considered by Canada as sovereign Canadian airspace.²⁹¹ The United States objects to the Canadian position.²⁹²

VIII. MILITARY AIR OPERATIONAL ISSUES

Unlike most other multilateral treaties, the Chicago Convention contains a specific disposition pertaining to its application

²⁹⁰ According to the Annotated Supplement to *The Commander's Handbook on the Law of Naval Operations*:

[S]elf defense . . . is the act of defending from attack or threat of imminent attack . . . this concept relates to localized, low-level situations that are not preliminary to prolonged engagements. The response of two U.S. Navy F-14 aircraft to the attack by two Libyan SU-22 aircraft over the Gulf of Sidra on 14 August 1981 was an exercise of unit self-defense against a hostile force that had committed a hostile act and posed a continuing threat of immediate attack." Commander's Handbook, *supra* note 22, at § 4.3.2.2; *see also* U.N. Doc. S/17938 (Mar. 25, 1986) ("The shootdown of two libyan MiG-23s on 4 January 1989 by two F-14s over international waters of the Mediterranean Sea more than 40 nm off the eastern coast of Libya, after repeatedly turning on them and not breaking off the intercept was an act of unit self-defense against units demonstrating hostile intent."); U.N. Doc. S/20366 (Jan. 4, 1989).

²⁹¹ For a discussion on Canadian airspace, *see* Canada, Statement Concerning Arctic Sovereignty, I.L.M. 1723, 1728 (1985).

²⁹² Discussion of this complex issue is beyond the scope of this paper. *See Agreement Between the Government of Canada and the Government of the United States of America on Arctic Cooperation*, 28 I.L.M. 142 (1988); Nicholas C. Howson, *Breaking the Ice: the Canadian-American Dispute over the Arctic's Northwest Passage*, 26 COLUM. J. TRANS. L. 337 (1988).

during times of armed conflict.²⁹³ The wording of Article 89 is extremely broad and provides an interesting interpretative quandary. A literal interpretation of this article would create bizarre situations during times of armed conflict, allowing overflight of enemy territory by aircraft of a belligerent state. This situation is inconsistent with a state of armed conflict. We therefore proffer that a literal interpretation of Article 89 is unreasonable. To say the least, a very restrictive interpretation of this article would probably prevail between belligerents. Nonetheless, Article 89 must still be read, interpreted, and applied in conjunction with Article 3(d). Furthermore, Chicago system rights that are consistent with a state of armed conflict would continue to apply. Thus, a state of belligerency between States would not suspend the obligation of combatants to execute their missions with due regard for the safety of civil air navigation.

During times of armed conflict, international laws governing the conduct of hostilities impose upon combatants a fundamental obligation to distinguish themselves from the civilian population. Military aircraft participating in belligerent activities must therefore be clearly identified as such. Belligerent military aircraft are legitimate targets anywhere outside of a neutral jurisdiction.²⁹⁴ Rules of international humanitarian law prohibit the attack of a disabled aircraft that has lost its means of combat, or of an aircraft where the pilot is surrendering. There is no military advantage to be gained by continuing an attack on an airplane that is clearly *hors de combat*. It is, however, important to note that in air warfare, it is lawful to feign disablement or distress if the purpose of such a maneuver is to coax the enemy to end an attack. Thus, an aircraft that appears to be disabled can still be legitimately attacked. Nonetheless, if there is certainty that the aircraft is so damaged as to permanently prevent it from combat, then it may not be attacked.²⁹⁵ If a military aircraft

²⁹³ Chicago Convention, *supra* note 23, at art. 89.

In case of war, the provisions of this Convention shall not affect the freedom of action of any of the contracting States affected, whether as belligerent or as neutrals. The same principle shall apply in the case of any contracting State which declares a state of national emergency and notifies the fact to the Council.

²⁹⁴ See Garner, *International Regulation of Air Warfare*, 3 AIR L. REV. 309-311 (1932); Myres S. McDougal & Florentino P. Feliciano, *International Coercion and World Public Order - The General Principles of Law of War*, 67 YALE L. J. 771, 830 (1958).

²⁹⁵ Commander's Handbook, *supra* note 21, at para. 12.6.

lands in belligerent territory, then its military occupants have a right to POW status, and if there are civilians or protected persons on the aircraft, these must be respected.

A. MEDICAL AIRCRAFT

International humanitarian law protects properly identified "medical aircraft"²⁹⁶ during armed conflict.²⁹⁷ The establishment of certain routes and the use of the protective emblem of either the red cross or red crescent protects medical aircraft flights.²⁹⁸ These symbols are placed on the lower, upper, and lateral surfaces of the airplane.²⁹⁹ Aircraft may use light signals consisting of a flashing blue light,³⁰⁰ a radio signal,³⁰¹ or an electronic identification.³⁰² A radio signal identifying the aircraft "PAN PAN" (preferably spoken three times) or "MAY-DEE-CAL" indicates a protected medical aircraft pursuant to the 1949 Geneva Convention.³⁰³ The station addressed by such a medical aircraft unlawfully interfered with, must render all possible assistance to the medical aircraft.³⁰⁴ Medical aircraft also benefit from certain rights when landing at civil airports.³⁰⁵ Approach sequences are to be established giving priority to "hospital aircraft or aircraft carrying seriously injured persons requiring ur-

²⁹⁶ The Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea defines a "medical aircraft" as "aircraft exclusively employed for the removal of the wounded, sick and shipwrecked, and for the transport of medical personnel and equipment." Geneva Convention II, *supra* note 69, at art. 39. Within the Additional Protocol I, such aircrafts are found in "medical transport." See Article 8(j).

²⁹⁷ See generally Edward R. Cummings, *The Judicial Status of Medical Aircraft Under the Conventional Laws of War*, 66 MIL. L. REV. 105 (1974) (discussing the protection by international humanitarians for properly identified medical aircraft); P. Eberlin, *The Identification of Medical Aircraft in Periods of Armed Conflict*, 1982 INT'L REV. RED CROSS 202.

²⁹⁸ Geneva Convention II, *supra* note 69, at art. 39.

²⁹⁹ See *id.*

³⁰⁰ See Protocol additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, art. 6, 1125 U.N.T.S. 3 [hereinafter Protocol I].

³⁰¹ See *id.* at art. 7.

³⁰² See *id.* at Annex I, art 8; see also Chicago Convention, *supra* note 23, at Annex 10.

³⁰³ See Geneva Convention II, *supra* note 69, at Annex 10, vol. II §§ 5.3.3.4.1-2.

³⁰⁴ See *id.* at Annex 10, vol. II, § 5.41.

³⁰⁵ See *id.* Within the ICAO documents, the term "medical aircraft" refers to aircraft protected under the Geneva Convnetion, Annex 10, Volume II, Section 5.3.3.4.1 and 5.3.3.4.2 Convention of 1949, and under the Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I). See ICAO Doc. 444 § 6-3.

gent attention.”³⁰⁶ Controllers may also give special authorization to such aircraft for use of the maneuvering areas.³⁰⁷

ICAO rules for the use of Secondary Surveillance Radar (SSR) transponders are established in the *Procedures for Air Navigation services, Rules of the Air and Air Traffic Service*.³⁰⁸ The rules presently establish a system of temporary reservations of SSR codes to protect medical aircraft during an international armed conflict.³⁰⁹ In the long term, ICAO foresees Mode S technology for the unique identification of medical aircraft.³¹⁰ When necessary, SSR codes are to be reserved for exclusive use by medical aircraft operating in areas of armed conflict.³¹¹ During the Gulf War, the ICRC operated medical aircraft duly identified with SSR. Since the end of the Gulf conflict, ICAO received requests for SSR codes from other organizations (both public and private), which operate humanitarian relief operations in the area.³¹²

If a medical aircraft either lands, alights involuntarily, or lands in enemy or enemy occupied territory, the crew, the sick, and shipwrecked shall be detained as prisoners of war.³¹³

A properly identified medical aircraft,³¹⁴ used as such, is exempt from attack.³¹⁵ An aircraft chartered by the International Red Cross has the same status as a medical aircraft and can be identified as such.³¹⁶ The first international treaty dealing specifically with the sick and wounded military medical aircraft was

³⁰⁶ ICAO Doc. 444 § 12.1.1 (b).

³⁰⁷ See *id.* at § 13.6 (b) (a maneuvering area is defined as that part of an aerodrome to be used for the take-off, landing and taxiing, excluding aprons).

³⁰⁸ ICAO Doc. 4444-RAC/501.

³⁰⁹ ICAO Doc. 444 § 1.4.4.

³¹⁰ ICAO Doc. AN-WP/6619, p. 2-3.

³¹¹ ICAO Doc. 444 § 5.2.3 (these are “allocated by ICAO through its Regional Offices in co-ordination with States concerned, and should be assigned to aircraft for use within the area of conflict.”)

³¹² ICAO Doc. AN-WP/6619, p. 2.

³¹³ See Geneva Convention II, *supra* note 69, art. 39.

³¹⁴ See Protocol I, *supra* note 300, at arts. 18 and 24 (each promulgates rules of protection for medical aircraft).

³¹⁵ See Louise Doswald-Beck, *The Protection of Medical Aircraft in International Law*, 27 ISRAEL Y.B. ON HUM. RTS. 151 (1997); Green, *supra* note 221; Eberlin, *supra* note 297; Cummings, *supra* note 297, at 105-141.

³¹⁶ See Louise Doswald-Beck, *Vessels, Aircraft and Persons Entitled to Protection During Armed Conflicts at Sea*, 1994 BRIT. Y.B. OF INT'L L. 211, 268 (1994).

the Geneva Convention of 1929.³¹⁷ Medical aircraft had to be painted white and had to bear the distinctive sign of the Red Cross or Red Crescent.³¹⁸ Methods of warfare have greatly advanced since 1949. Aircraft can now be attacked from long distances without visual contact. Technology has reduced the Red Cross and Red Crescent signs level of protection. New rules are needed with infrared sensitive and perhaps even electronic "Red Cross, Red Crescent" devices capable of interfacing with so called "smart weapons."³¹⁹

During times of armed conflict, the overflight by medical aircraft of areas that are controlled by an enemy force, and contact zones, is restricted.³²⁰ Military medical aircraft must follow designated routes and altitudes, and must bear a Red Cross or Red Crescent.³²¹ A notification to the enemy of medical flights is highly recommended and agreements can be reached assuring the safety of medical flights. But no agreement is required for flights over territories, not controlled by enemy forces.³²² A medical aircraft may, however, be seized by enemy forces if it is discovered that the aircraft in question is in fact a non-medical aircraft, if it has been used to acquire a military advantage, or if

³¹⁷ The present Geneva system of international humanitarian law dates from 1949 and are: Geneva Convention I, *supra* note 69; Geneva Convention II, *supra* note 69; Geneva Convention III, *supra* note 69; Geneva Convention Relative to the Protection of Civilian Persons in Time War, 6 U.S.T. 3516, 75 U.N.T.S. 287 (Aug. 12, 1949) [hereinafter Geneva Convention IV]. To these four conventions, an additional protocol was added in 1997: Protocol I, *supra* note 300. The International Court of Justice ruled that these four Geneva Conventions represent customary international law. For analysis of this decision, see Kazuomi Ouchi, *The Threat or Use of Nuclear Weapons: Discernible Legal Policies of the Judges of the International Court of Justice*, 13 *CONN. J. INT'L L.* 107 (1998); Anne-Sophie Millet, *Les Avis Consultatifs de la Cour Internationale de Justice du 8 Juillet 1996; Licéité de l'utilisation des armes nucléaires par un Etat dans un conflit armé; Licéité de la menace ou de l'emploi d'armes nucléaires*, 1997-1 *R.G.D.I.P.* 142 (1997). It is important to note that the Geneva Conventions and the Additional Protocol I refer to times of war. See Article 2 of all four Conventions and Additional Protocol I, art/ 1.3.

³¹⁸ These rules are also present in the latest Geneva Conventions of 1949. See Geneva Convention I, *supra* note 69, at arts. 36 and 38; Geneva Convention II, *supra* note 69, at art. 39.

³¹⁹ See generally Gerald C. Caudey, *Visibility of the Distinctive Emblem on Medical Establishments, Units, and Transports*, 1990 *INT'L REV. RED CROSS* (discussing the need for new Red Cross or Red Crescent signal devices).

³²⁰ Red Crescent signal devices. See Protocol I, *supra* note 300, at arts. 26 and 27.

³²¹ See Geneva Convention I, *supra* note 69, at arts. 38-44; Geneva Convention II, *supra* note 69, at arts. 41-95; Protocol I, *supra* note 300, at art. 18.

³²² See Protocol I, *supra* note 300, at art. 25.

it has flown in breach of an agreement between the belligerents.³²³ In this case, the medical aircraft becomes war booty.

A medical aircraft may not fly over neutral territory without prior authorization.³²⁴ This being said, it is important to stress that a neutral power, which allows medical overflights, does not breach the rules of neutrality. Nonetheless, the neutral power must assure itself that these flights do not contribute in giving a belligerent a military advantage.³²⁵ Medical aircraft can at times be forced to land and be inspected.³²⁶ If an inspection reveals that a medical aircraft is being improperly used, the aircraft can be seized. If the said aircraft is to be used by the seizing party, then it must retain its medical use if it was previously permanently designated as such. However, if the seizing party cannot take proper care of the sick and wounded that are on board, the aircraft must be allowed to continue its flight.

Furthermore, the flight of a medical aircraft can be categorized under the Chicago Convention regulatory system as either state or civil. The classification will depend on the circumstances surrounding the flight in question. Those elementary conditions of humanity dictate that medical aircraft be seen as civil flights. Nonetheless, the fact remains that their Chicago Convention-type classification has no effect whatsoever on their protected status under the Geneva Conventions. That is to say that a civil designated flight under the Chicago Convention is not necessarily a civil flight under the international humanitarian law, which regulates the conduct of hostilities.

B. TARGETING

As a rule, a civil aircraft,³²⁷ properly identified as such,³²⁸ are not a legitimate military target and should not be attacked.³²⁹ Nonetheless, certain situations can occur where a civil (IHL type

³²³ See *id.* at art. 30.

³²⁴ See *id.* at art. 31.

³²⁵ See *id.* at art. 28.

³²⁶ See *id.* at art. 30.

³²⁷ During an armed conflict it is important to note that the concept "civil aircraft" includes a state aircraft that is not a military aircraft. These are presumed to be carrying civilians. If a civil aircraft is functioning in support of military activities, such as troop transport, it may then be attacked.

³²⁸ See generally Horace B. Robertson, *The Status of Civil Aircraft in Armed Conflict*, ISRAEL Y.B. ON HUM. RTS. 113, 150 (1997).

³²⁹ "During WWII, civil aircraft, particularly civil airliners, were not generally regarded as proper objects of attack by the "Allies or Axis powers." See *International Law — The Conduct of Armed Conflict and Air Operations*, JAG-USAF 4-3 (Nov.

classification) aircraft can be legitimately attacked. For example, a civil aircraft, escorted by a military aircraft, can be considered as a legitimate target and be legally attacked.³³⁰ An unauthorized entry of a civil aircraft into a flight-restricted zone can also be perceived as creating a military threat. At this point, a civil aircraft can become a legitimate target. The determination of the threat resulting by the entry of a civil aircraft into a restricted zone will, however, be contingent upon the severity and intensity of the conflict.³³¹

The Chicago Convention civil/state classification system is not used in determining the "civil" nature of an airplane during times of international conflict and its subsequent legitimacy as a valid military target. The civil attribute (IHL classification) of an airplane during belligerent times determines the legitimacy or illegitimacy of the targeting of an airplane. It is important to note that the concept "civil" has a different definition within the *corpus* of international humanitarian law than within the Chicago system. Article 52 of Additional Protocol I defines the concept of civil negatively as:

1. Civilian Objects shall not be the object of attack or reprisals; Civilian objects are all objects, which are not military objectives as defined in paragraph 2.
2. Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage
3. In case of doubt whether an object, which is normally dedicated to civilian purposes, such as a place of worship, a house, or other dwelling, is being used to make an effective contribution to military action. It shall be presumed not to be so used"³³²

The Chicago Convention-type classification can be used as an important element of proof in determining the "civil" concept as used in international humanitarian law, but it is not the deter-

19, 1976); see also Eric David, *Principes de Droit des Conflits Armés* 2.13 (Bruylant ed., 2d ed., 1999).

³³⁰ See Frederic de Mulinen, *Handbook on the Law of War for Armed Forces*, 1987 INT'L REV. RED CROSS 110.

³³¹ See generally Andreas F. Lowenfield, *Agora: the Downing of Iran Flight 644, Looking Back and Looking Ahead*, 83 AM. J. INT'L L. 318, 336-341 (1989) (providing an interesting Analysis of the downing of a available passenger plane during a military conflict).

³³² Protocol I, *supra* note 300, at art. 52.

mining factor. There is an interesting difference in approach in determining the "civil" status of airplanes between the Chicago system and in international humanitarian law.

Within the Chicago system, the state of registry of an airplane primarily controls the determination of its use. The classification must respect Article 3(b) of the system. Unless an aircraft falls within one of the three categories of State Aircraft it is a Civil Aircraft.

Additionally, Protocol I shifts the burden for determining the precise use of an aircraft, and thus, its legitimacy as a valid military target, away from the state controlling the aircraft to the state which is attacking the aircraft. In case of doubt, that an aircraft, which is designated as civil under the Chicago system is being used to make an effective contribution to military action, or represents an actual threat, the said aircraft must be presumed as non-military and not be attacked.

The presumption of civilian use and the placing of the burden of proof on the state which is attacking the target has been criticized as creating an imbalance, ignoring the realities of armed conflict, facilitating the use of human shields, and not representing the customary law on the issue.³³³

Commanders must make rapid decisions during times of conflict in qualifying airplanes as either friend or foe, civil or military. In determining the legitimacy of a targeted aircraft, the following parameters can be indicative of the function of the flight, namely:

Flight profile such as speed range, rate of climb/descent, rate of turn, altitude, can be indicative of a military aircraft and aggressive intent (i.e. descending and accelerating profile towards a warship);

Emissions from fire control radar, aircraft weather radar and radio altimeter can be indicative of a civil airliner;

Radio communications established;

Origin of the flight, (civil or military or dual use airport)

IFF mode 3 (SSR mode A) response³³⁴

³³³ For a discussion of the issue, see United States: Department of Defense Report to Congress on the Conduct of the Persian Gulf War - Appendix on the role of the Law of War (April 1993), *reprinted in* 31 I.L.M. 612 (1992).

³³⁴ Report of Investigation as Required in the Council Decision of 14 July 1988, ICAO Doc. C-WP/8708, p.14.

A radar illumination can be an aggressive act and justify the use of defensive counter-measures.³³⁵

The fact that a civil aircraft bears the mark of an enemy state is conclusive evidence of its enemy character.³³⁶ Nonetheless, it may only be attacked if by its nature, location, purpose, or use it makes an effective contribution to military action, and its total or partial destruction, capture or neutralization will yield a definite military advantage. Also, the fact that a civil aircraft bears the mark of a neutral state is *prima facie* evidence of its neutral character.³³⁷ However, any aircraft owned or controlled by a belligerent state possesses enemy character irrespective of the fact that it may be operating under the markings of a neutral state.³³⁸ A civil aircraft, which bears the marks of a neutral State, could therefore expose itself to the possibility of attack if any of the following conditions are met:

1. the aircraft is believed on reasonable grounds to be carrying contraband, and, after prior warning or interception, it intentionally and clearly refuse to divert from its destination, or intentionally and clearly refuse to proceed for visit and search to a belligerent airfield that is safe for the type of aircraft involved and reasonably accessible;
2. the aircraft engages in belligerent acts on behalf of the enemy;
3. the aircraft acts as auxiliaries to the enemy's armed forces or is incorporated into or assist the enemy's intelligence system; or
4. the aircraft otherwise makes an effective contribution to the enemy's military action, e.g., by carrying military materials; by intentionally and clearly refusing to divert from their destination, after prior warning or interception; or intentionally and clearly refuse to proceed for visit and search to a belligerent airfield that is safe for the type of aircraft involved and reasonably accessible.³³⁹

It is important to stress that the aircraft in question must both intentionally and clearly refuse to either divert or land as required before it is attacked.

³³⁵ According to the United States report on the investigation into the circumstances surrounding the downing of the Iran Air flight 655 on July 3 1988: Under the rules of engagement "the primary responsibility of the Commanding Officer under the ROE is the defense of his ship from attack or from threat of imminent attack." See ICAO Doc. C-WP/8708, Annex E, at 15.

³³⁶ See *San Remo Manual*, *supra* note 66, at § 112.

³³⁷ See *id.* § 113.

³³⁸ See Commander's Handbook, *supra* note 21, at para. 7.5.

³³⁹ See *San Remo Manual*, *supra* note 66, at § 70.

Once radio communication is established with the civil airplane, its rerouting is not always a preferable alternative. In such cases, coordination between the military authorities and the appropriate ATC authorities is extremely important.³⁴⁰ Following incidents over the Strait of Hormuz and the downing of Air Iran Flight 655, the ICAO recommended that optimum functioning of civil/military co-ordination be pursued. The recommendation includes communicating with ATS authorities pertaining to promulgated routes, types of airspace, information on scheduled civil flights, exchanging of real-time flight progress information delays, and information on non-scheduled flights.³⁴¹ Thus, military units should, according to the ICAO report, be equipped to monitor appropriate ATC frequencies "to enable them to identify radar contacts without communication."³⁴² Furthermore, in order to help their own identification as civil airplanes, pilots should have continuous operation of airborne weather radars and radio altimeters.³⁴³

Indeed, military operators must "take all possible measures to prevent a civil aircraft engaged in commercial or private service from being fired upon inadvertently."³⁴⁴ Military planners must be aware of air routes, flight plans, and air traffic service procedures within their area of operation.³⁴⁵ Civil airliners are, in principle, exempt from attack if they are innocently employed carrying civilian passengers in either scheduled and non-scheduled flights along their planned routes, and do not intentionally hamper the movements of combatants.³⁴⁶ If the airliner is within the vicinity of military naval operations then it must, in order to maintain its protection from attack, obey the orders of

³⁴⁰ For example, the investigation report of the Department of Defense on the downing of Iran Air Flight 655 on 3 July 1988 relates the following: "The first documentation of conflict between civilian COMAIR and a CJTFME unit was on 8 June 1988 when the USS HALYBURTON issued nearly continuous challenges to an aircraft landing at Dubai International. British Airway FLT 147 acknowledged the challenge, made the turn as directed by the USS HALYBURTON and immediately came into a "near miss" situation with another civilian aircraft. A formal protest was filed by ATC Dubai and an American Embassy letter of apology resulted." ICAO Doc. C-WP/8708, Annex E, para.12.

³⁴¹ ICAO Doc. C-WP/8803 (Appendix).

³⁴² *See id.*

³⁴³ *See id.*

³⁴⁴ *See San Remo Manual, supra* note 66, at § 71.

³⁴⁵ ICAO Doc. 9554-AN/932 (1990); *see also San Remo Manual, supra* note 66, at § 75.

³⁴⁶ *See San Remo Manual, supra* note 66, at § 56.

the naval military commanders.³⁴⁷ Before a civil airliner is attacked, military operators must assure the exhaustion of all available means of exercising control over the aircraft.³⁴⁸ Thus, the aircraft may only be attacked if diversion for landing, visit and search, and possible capture is not feasible; no other method is available for exercising military control; the circumstances of non-compliance are sufficiently grave that the aircraft has become, or may be reasonably assumed to be, a military objective; and the collateral casualties or damage will not be disproportionate to the military advantage gained or anticipated.³⁴⁹

C. DOWNED AIRCRAFT

There is no specific multilateral treaty regulating the status of a downed or captured military aircraft. Nonetheless, there are customary norms that have developed on this issue.³⁵⁰

Whether a downed military aircraft maintains its privilege of sovereign immunity is debatable.³⁵¹ Sovereign immunity must not be confused with the rules governing the loss of proprietary rights. Ownership of military aircraft is lost only if there is capture or surrender during hostilities.³⁵² Thus, an aircraft, which has been downed (unless is downed after capture) in the territorial waters of a foreign state, does not by itself transfer ownership. The cause of the downing by either enemy action or accidental—is irrelevant according to the International Law Commission:

Current practice suggests that there is a presumption against abandonment of title over naval or State-owned vessels, and that an explicit act of transfer or abandonment is required. The rationale for this view lies in part in the security implications of the

³⁴⁷ See *id.* §§ 72-73.

³⁴⁸ See *id.* § 57.3(c).

³⁴⁹ See *id.* § 59.

³⁵⁰ See Emmanuel du Pontavice, *Les Epaves Maritimes Aeriennes et Spatiales en Droit Francais*, Aviation Vol. 1 LGDJ, ENCYCLOP/DIE DALLOZ para.14 (1991) ("l'aeronef perd sa nature lorsqu'il devient inapte a la navigation aeriennne").

³⁵¹ See U.N. Convention on the High Seas, *supra* note 37, at arts. 8-9; Migliorino, *The Recovery of Sunken Warships in International Law*, in *ESSAYS ON THE NEW LAW OF THE SEA* 250, 251 (B. Vukas ed., 1985).

³⁵² As a codified example of this practice, see the Multilateral Treaty of Peace with Japan (San Francisco Treaty), Sept. 8, 1951, art. 14(a), 3 U.S.T. 3169, 136 U.N.T.S. 45 (articulating that each of the Allied Powers "shall have the right to seize, retain, liquidate or other-wise dispose of all property, rights and interests" of Japan and Japanese nationals); see also J. Ashley Roach, *Sunken Warships and Military Aircraft*, Department of the Navy-Naval Historical Center, available at <http://history.navy.mil/branches/org12-7j.htm>.

vessel or aircraft falling into the possession of unauthorized persons, and in part in the desire to keep the wreck untouched as a war grave.³⁵³ Sunken aircraft may still have unexploded ordnance, hazardous, or noxious materials on board.³⁵⁴

Granted, access to the downed aircraft is subject to the authorization of the State having jurisdiction of the territorial sea where the wreck is located, but there is no ownership transfer of the wreck itself. If the aircraft is downed in international waters, the access to the wreck is subject to authorization of the state of registry of the sunken aircraft. It is possible to consider the wreckage of a downed aircraft, depending upon its condition, as a war grave. Taken as such, the wreckage may benefit by certain treaty dispositions in International Humanitarian Law.³⁵⁵ U.S. government policy denies permission to salvage sunken military aircraft that contain deceased personnel or explosives. U.S. policy further affords foreign military airplanes sunk in U.S. waters the same treatment.³⁵⁶

D. CULTURAL PROPERTY AND SAFE CONDUCT

Aircraft exclusively engaged in the transportation of national or international cultural property could also benefit from special protection during armed conflict.³⁵⁷ Acts of hostility against such airplanes are prohibited because protection is subject to procedures authorizing special transfers.³⁵⁸

An aircraft can also be granted safe-conduct.³⁵⁹ This is done by agreement between the parties during armed conflict. The safe conduct protection applies if the aircraft is innocently employed in its agreed role, does not intentionally hamper the movement of combatants, and complies with the details of the safe-conduct agreement including the possibility of inspection. The problem, however, lies in the time and manner of this inspection. Should the aircraft be forced to land or even rerouted for such an inspection? It has been cogently argued that such

³⁵³ International Law Commission Report, Annex II p.9 (1996), available at www.un.org/law/ilc/reports/1996/annex2.htm.

³⁵⁴ See J. Ashley Roach, *supra* note 352, at http://prosea.org/articles-news/exploration/SHIPWRECKS_RECONCILING_SALVAGE.htm

³⁵⁵ See Protocol I, *supra* note 300, at art. 43.

³⁵⁶ See Commander's Handbook, *supra* note 21, at para. 2.1.2.2.

³⁵⁷ See Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, art. 12, 249 U.N.T.S. 240.

³⁵⁸ See *id.* at arts. 13, 16, 17, 18 and 19.

³⁵⁹ See *San Remo Manual*, *supra* note 66, at art. 75.

inspections should occur before take-off of the aircraft or simply that a representative from an independent and impartial body be invited aboard.³⁶⁰ There is not a special emblem or signal that identifies airplanes, which benefit from safe—conduct privileges. An aircraft that is granted safe-conduct may not use the Red Cross and Red Crescent emblems.

IX. CONCLUSION

Aviation is a global activity operating within a shared medium by both state and civil actors. It is in the interest of all that safety be the categorical imperative of all who utilize the medium. Due regard is a genus norm of international law, having a conventional expression in both the Chicago system of international public air law and in the U.N. Convention on the Law of the Sea. These two treaty systems share a common approach to the application of due regard—namely that the enforcement of due regard is a state obligation. Within both treaty systems, the state of registry having jurisdiction over the airplane, sanctions the due regard norm.

The main element of due regard in the Chicago system is one of communication among military aircraft, civil aircraft, and ATS authorities. The primary element of due regard for military aircraft in maritime operations is a balancing of rights of coastal states with air navigation rights established in the U.N. Convention on the Law of the Sea.

Communication is the primary fundamental regulatory premise establishing safety in our skies. Civil ATS authorities have a reciprocal obligation to promote, facilitate, and encourage this communicative interface.

State aircraft should be equipped with a means of communication and with procedures to interact safely with civil aircraft and civil ATS authorities. State aircraft should comply whenever possible with the standards of Annex 10 to the Chicago Convention. This recommendation can be very important during times of armed conflict or during any other time when a military pilot acts as his own flight controller. By a broad interpretation of Article 3(d), we believe that a reasonable argument can be presented to include a communications dimension within the “due regard” rule. A maximum exchange of information between military operators and civil aviation authorities is a *sine*

³⁶⁰ See Doswald-Beck, *supra* note 315, at 268.

qua non in air traffic management, allowing both military and civil air controllers to cope together with unforeseen circumstances.

The dual use of aircraft as civil and military creates an interesting regulatory conundrum. From a policy perspective, strong concerns exist as to treating civil-like military missions as Chicago-type civil flights. In treating military aircraft like civil aircraft, national regulatory agencies such as the American Federal Aircraft Administration (FAA), for example, could claim jurisdiction over investigation of military aircraft accidents. Such interference could prevent a military investigation to fully press into a thorough safety investigation of military aircraft incidents. Furthermore, military aircraft have classified system components on which information could not readily be released to civil agencies, thus, yielding cogent national security objections.

During times of conflict, military aviation should be bound only by the environmental protection rules duly established within the body of international humanitarian law.³⁶¹

Military airplanes should be categorized in two classes, first, those that conform ICAO standards for navigation and safety, and second, those that do not. Only military aircraft that respect ICAO standards should be allowed for dual use missions and civil flights. Through a joint working group ICAO and NATO could set up a proposal for an international licensing system concerning dual use military aircraft.

As far as the discontinued CAA-Canada litigation was concerned, the basis of the Canadian position was strong. Granted, the Canadian arguments needed refinement while the arguments pertaining to international comity needed to be corrected. The Canadian arguments, nonetheless, had more merit than the ones proffered by the CAA. We are happy this issue has been amicably settled out of court, respecting the integrity of the Chicago system. However, had this issue required a court

³⁶¹ For an excellent analysis on the issue of the environment and war, see Michael N. Schmitt, *Green War: An Assessment of the Environmental Law of International Armed Conflict* 22 YALE J. INT'L L. 1 (1997); Michael N. Schmitt, *War and the Environment: Fault Lines in the Perspective Landscape Archiv Des Volkerrechts* 37 YALE J. INT'L L. 26 (1999); Wil D. Verwey, *Observations on the Legal Protection of the Environment in Times of International Armed Conflict* 1994 HAGUE Y.B. INT'L L. 35; Antoine Bouvier, *Recent Studies on the Protection of the Environment in Time of Armed Conflict*, 291 INT'L REV. RED CROSS 554 (1992); L. C. Green, *The Environment and the Law of Conventional Warfare*, 29 CAN. Y.B. INT'L L. 222 (1991); John H. McNeill, *Protection of the Environment in Times of Armed Conflict: Environmental Protection in Military Practice*, 1993 HAGUE Y.B. INT'L L. 75.

decision, we believe the courts would have respected the normative values established by States within the Chicago Convention as we have argued in our proffered interpretation of Article 3(d). Although courts have the capacity to interpret treaties, courts do not have the authority to modify treaties nor force states into an agreement that neither intended to have.³⁶² Accepting the CAA position would weaken the normative value of the Chicago Convention to a point of a treaty modification.

An application of a commercial paradigm to the civil military interface would change the entire regulatory matrix. Civil air navigation has greatly benefited from the present non-commercial paradigm.³⁶³ Military navigational assets such as the GPS satellite constellation, a property of the USAF, are presently being used without cost by civil air navigation. The free sharing of this infrastructure goes well beyond the requirements of due regard. Regrettably, the application of a commercial paradigm might force a change in this sharing.

Furthermore, it is legally and diplomatically inappropriate for one state to levy fees amounting to taxes upon another state. In the case of diplomatic overflight by state aircraft, the over flying state aircraft is not on a business trip, and must receive corresponding diplomatic treatment. A valid fear is that the contractual model suggested by the CAA opens the door for possible abuses. Fees could become arbitrary and even perhaps prohibitive. Humanitarian flights by state aircraft could be severely affected. Charging state aircraft navigational fees would necessarily increase the costs of humanitarian assistance. Justifiably negative actions for pecuniary reasons affecting humanitarian aid is extremely iniquitous towards those who depend on air delivery of humanitarian assistance.

Through our proffered interpretation of the due regard genus norm, states cannot allow their Chicago-type state aircraft to operate in international airspace without proper consideration for the safety of civil air navigation. If the arguments presented by the CAA were accepted, these rules would be reduced to a

³⁶² In the Iranian Oil case, Judge Read wrote: "*It is my duty to interpret the Declaration and not to revise it. In other words, I cannot, in seeking to find meaning of these words, disregard the words as actually used, give them a meaning different from their ordinary and natural meaning, or add words or ideas which were not used in the making of the Declaration*" Anglo-Iranian Oil Co. (U.K. v. Iran), 1952 I.C.J. 20 (July 22); see also James F. Hogg, *The International Court: Rules of Treaty Interpretation*, 43 MINN. L. REV. 369 (1959).

³⁶³ See 1952 I.C.J. at 144-47 (Read, J., dissenting).

discretionary contractual level. The result would be a reduction of the safety of air traffic within international airspace and prejudice to air traveler. The obligatory coordination, during peacetime, of civil and military flights in international air space by the same ATC authority is, and must remain an important part of the Chicago Convention. Furthermore, we hope their suggestions should be considered by the legal committee of ICAO in order to have a formal joint study with NATO on the status of military aircraft and ensure a proper application of Article 3(d) by all states.